No.

IN THE

Supreme Court of the United States

MARIE INEZ CRAVENS, et al,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Immediately after notice of claim, the City of La Marque, Texas fired Officer Ontiveros for violating its "official" DWI arrest policy. Apparently, the officer did not arrest as required by the "official" policy because the impaired driver, Cravens, was the brother of a fellow police officer. After being released by the officer, Cravens drove from the scene and moments later ran head-on into on-coming traffic and later died. Petitioners accused the City of tacitly condoning this "special favors" to family members "don't arrest" practice both before and after the Cravens' incident. Under these circumstances, petitioners present the following questions for this Court's review:

1. Whether a city owes a DeShaney "state-created danger" duty to protect an impaired driver when the police (i) cut-off the driver's private sources of aid, then (ii) release him to drive, knowing he poses a danger to himself and others.

2. Whether a city owes a DeShaney "special relationship" duty to prevent an impaired driver from driving once the police (i) detain the driver and (ii) have probable cause to arrest.

PARTIES TO THE PROCEEDING

The parties below and here are:

Petitioners are Marie Inez Cravens, individually and on behalf of the Estate of Abner Cravens, Deceased and all wrongful death and survival action beneficiaries including Tony Cravens, Natasha Cravens and Lorreta Cravens, as next friend of L C, a minor.

Respondent is the City of La Marque, Texas.

RULE 29.6 STATEMENT

Petitioners are natural persons and thus are not corporations.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion affirming the district court's order of dismissal was not reported. (App., *infra,* 1a - 2a). The district court's order of dismissal granting defendant's 12 (b)(6) motion was not reported. (App., *infra,* 3a - 18a).

JURISDICTION

The court of appeals' judgment was entered on March 16, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first section of the Fourteenth Amendment to the United States Constitution establishes that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioners sued the City of La Marque, Texas ("the City") seeking wrongful death and survival action damages for improperly establishing and implementing its DWI policies and practices. The district court correctly exercised subject matter jurisdiction because petitioners sought remedies under 42 U.S.C. §1983 for the alleged violation of petitioners' Fourteenth Amendment substantive due process rights. 28 U.S.C. §§ 1331 and 1343 vested the district court with original jurisdiction to hear these federal claims.

A. Proceedings Below

Petitioners asserted two legal theories against the City:

1. Breach of the "state-created danger" DeShaney duty; and,
2. Breach of the "special relationship" DeShaney duty.

The court of appeals affirmed the district court's judgment declaring:

> [T]he appellants failed to establish that a § 1983 cause of action exists in the Fifth Circuit on the state-created-danger theory under these facts. (App., 2a).

Implicitly, the court also rejected the DeShaney "special relationship" theory of liability arising when the officer detained Cravens for investigation of DWI.

Petitioners alleged the City was directly liable for the wrongful conduct of its police officer for:

(1) the City's pre-accident conduct which led to Ontiveros' incompetent action and wilful neglect of duty, and

(2) the City's post-accident ratification of Ontiveros' incompetent action and wilful neglect of duty.

As to the City's pre-accident conduct, petitioners accused the City, *inter alia*, of tacitly condoning the practice of granting "special favors" to family members of its department. (App. 32a). This "don't arrest" practice encouraged the officer to not arrest Cravens (the brother of a fellow City police officer), even though the official policy of the City required arrest. The

City should have made it plain that there were no exceptions to its official DWI arrest policy, but did not. The City lived with a known double standard before this accident.

As to the City's post-accident conduct, the complaint alleged the City's initial inaction (no discipline whatsoever) constituted a ratification of Officer Ontiveros' wrongful action and proved to be consistent with the City's pattern, practice or custom of giving "special favors" to the family of fellow officers. Not until the City was threatened with suit two months after the accident did the City take any substantive action to try and protect itself from liability; to wit: they fired Ontiveros for incompetence and wilful neglect of duty. These late efforts were a subterfuge to try and hide the City's direct wrongful conduct that led to the death of Cravens. (App. 33a).

The City filed no answer in the case, but instead moved for dismissal under Fed. R. Civ. P. 12 (b)(6). The district court held no scheduling conference in the case or any hearings on the motion. There is no transcript to review.

Since the district court disposed of the case under 12 (b) (6), the live complaint establishes the relevant facts for consideration.

B. The Pleaded Facts

These facts are taken from the complaint, albeit edited and paraphrased for brevity (App., 23a -25a):

> On October 13, 2003, Abner Cravens rear-ended a vehicle driven by his cousin in La Marque, Texas. After the accident, his cousin and others were concerned about the safety of Cravens because he appeared to be intoxicated.

> The La Marque police came to the scene. At the scene, Officer Ontiveros was told that Cravens seemed to be intoxicated and needed help. Ontiveros observed Cravens' condition and knew that Cravens was in no condition to continue to drive his vehicle. Ontiveros advised that he would take care of the situation. Those at the scene believed Officer Ontiveros and left Cravens' well-being in the hands of Ontiveros.
>
> Ontiveros detained Cravens for questioning for several minutes and acquired probable cause to arrest Cravens for DWI, but failed to do so. Ontiveros released Cravens and allowed him to continue driving his vehicle even though Cravens posed a danger to himself and others.
>
> But for the intervention of Officer Ontiveros, Cravens' family member, friends and concerned citizens in the small community of La Marque, Texas would have continued looking out for the safety of Cravens and made sure that he was driven from the scene and given proper medical care where he would have been safe. Cravens was in a worse position after Officer Ontiveros intervened than Cravens would have been had Officer Ontiveros not done so.
>
> Shortly after being released by Officer Ontiveros, Cravens crossed the center line and ran head-on into oncoming traffic resulting in severe injuries from which he ultimately died several days later.

The entire complaint appears at App., 19a - 37a. The district court assumed that Cravens voluntarily intoxicated himself. The voluntariness (or not) of his intoxication is not

supported by the complaint at issue. There may be other good faith reasons for his involuntary intoxication.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over the "State-Created Danger" Theory

A. Only the Fifth Circuit Has Refused to Recognize the "State-Created Danger" Theory

The court of appeals for the Fifth Circuit has never recognized the "state-created danger" theory. Rios v. City of Del Rio, Texas, 444, F.3d 417 (5th Cir. 2006); McClendon vs. City of Columbia, 305 F.3d 314 (5th Cir. 2002) ("The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it." dissenting opinion of Judge Parker).

Every other circuit has recognized the "state-created danger" theory. Frances-Colon v. Ramirez, 107 F.3d 62, 63-64 (1st Cir. 1997); Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993); Kneipp v. Tedder, 95 F.3d 1199, 1201, 1208 (3d Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir.) (en banc), cert. denied, 516 U.S. 994 (1995); Kallstrom v. City of Columbia, 136 F.3d 1055, 1066-67 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989), overuled on other grounds by, White v. Lemacks, 183 F.3d 1253, 1256 (11th Cir. 199); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001). See also 159 A. L. R. Fed. 37, "State-created

Danger," or Similar Theory, as Basis for Civil Rights Action under 42 U.S.C.A.§ 1983.

B. The Fifth Circuit's Opinion Squarely Turned on Whether the "State-Created Danger" Theory Exists

The court of appeals has been criticized for avoiding the issue of whether the "state-created danger" theory exists in the Fifth Circuit. See, e.g., McClendon, supra, (dissenting opinion of Judge Parker). However, in this case, the court's opinion turned on only one issue: "[no] § 1983 cause of action exists in the Fifth Circuit on the state-created-danger theory under these facts." (App., 2a).

Though the court cites Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir. 1999) to support its ruling, (App., 2a), the facts of Saenz are importantly different from petitioners' case. In Saenz, the court held there was no constitutional violation when a senior deputy sheriff ordered his junior deputy not to arrest or investigate a known drunk driver who moments later drove his vehicle into oncoming traffic. Significantly, in Saenz, the police did not cut-off any private aid to the drunk driver. Therefore, there was no affirmative action. As well, the drunk driver was never stopped, detained, investigated or had liberties in any way restricted. So the police never formed any official relationship with the drunk driver.

In contrast, the officer in this case cut-off Cravens' private aid that very well may have saved Cravens' life. As well, the officer detained Cravens for questioning, thereby restricting Cravens' liberty and establishing an official relationship with Cravens. This detention triggered constitutional duties by either (1) increasing the danger to Cravens or (2) establishing an official "special relationship" that required the officer to do

his duty: arrest and protect or at least return Cravens to his private aiders.

These facts make it plain that the court affirmed the district court's ruling because the court refuses as a matter of law to recognize the "state-created danger" theory declared in DeShaney.

C. Only This Court Can Bring Uniformity to ThisVital Scheme of Constitutional Protections and Remedies

Only this Court can bring uniformity to this vital scheme of constitutional protections and remedies that hold government accountable for its wrongs. This remedy as applied in other circuits encourages the state to properly manage police power through accountability. Accountability leads to better conduct. Better conduct saves lives. Not only are petitioners entitled to their remedy, but the people are entitled to the benefits of uniform rules that hold the police accountable for their wrongs. The good people of the states of Texas, Louisiana and Mississippi are entitled to the same constitutional protections and remedies as those citizens living in the other 47 plus states, territories and district. Like King George, the Fifth Circuit has had plenty of opportunities to correct the error of its ways but refuses to do so. Therefore, only this Court can make things right.

Had Cravens lived in any other circuit, petitioners would be entitled to constitutional remedies. For example, consider the facts of Kneipp v. Tedder, 95 F.3d. 1199 (3d Cir. 1996). A police officer stopped an obviously intoxicated woman walking home with her husband, then required the husband to go home without his wife. The officer later released the wife to find her way home alone in cold weather. She never made it home.

She died from exposure and was found dead in a ditch. The Kneipp court held that the officer's actions could qualify as the requisite affirmative action for purposes of a "state-created danger" claim under 42 U.S.C. § 1983.

The facts of Kneipp are almost identical to petitioners' case: Cravens' cousin and others were helping him, the police arrived, cut-off his private aid, detained him, then released him to his ultimate death. In other circuits, there would be accountability for this wrong, but not in the Fifth Circuit. There is no accountability for this wrong here. There is no remedy. Instead of looking to the law for protection, we are forced to rely upon the goodwill and competence of the government for our safety and proper treatment.

II. The Fifth Circuit Erred in Declaring that the "State-Created Danger" Theory Does Not Exist

A. DeShaney Clearly Recognized the "State-Created Danger" Theory

> "While the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 201, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)

Chief Justice Rehnquist was of course, not creating new rights under the Constitution in DeShaney, but was simply seeing what our Constitution and history make plain: the Constitution was amended to protect the people from wrongful governmental conduct. When the police power is wrongly used affirmatively to cause harm to one's body, the people are entitled to hold the government accountable for that wrong.

This right arises not from the words of Chief Justice Rehnquist, but from the very fabric of our social contract. Our Constitution is merely some evidence of our rights as citizens manifested by reference to the well-understood and evolving term "due process." The full substantive contours of the term manifest as concrete facts emerge. *ex facto jus oritur.* In this area of law, the court of appeals seems to have lost sight of this basic principle of judicial decision making. The court continually refuses to embrace the lessons of DeShaney and refuses to submit itself humbly to DeShaney's precedential authority.

B. All the Other Circuits Have Declared that DeShaney Recognized the "State-Created Danger" Theory

As noted, supra, I. A., all the other circuits have submitted to the "state-created danger" precedent set by DeShaney.

C. Petitioners Properly Pleaded the "State-Created Danger" Theory

Though the "state-created danger" theory has not been declared to exist in the Fifth Circuit, the district court determined that petitioners properly pleaded its elements. (App. 15a). Therefore, satisfaction of the elements is not the issue. Petitioners ask this Court to declare that the cause of action exists. Their remedies on remand will naturally follow.

III. The Fifth Circuit Erred in Implicitly Ruling that DeShaney's "Special Relationship" Duties Do Not Extend to Investigative Stops

In affirming the district court's dismissal with prejudice, the court of appeals implicitly rejected petitioners' argument

that Cravens' detention was sufficient to trigger duties under DeShaney's "special relationship" theory.

This Court should hold that Officer Ontiveros' action of detaining Cravens for questioning was sufficient to trigger DeShaney "special relationship" duties. Detaining persons pursuant to accident investigation necessarily limits their liberty and thus should be sufficient to trigger DeShaney "special relationship" duties. Consider this illustration: if a police officer detained a driver for questioning on the side of the road and required the detained person to stand between his vehicle and the officer's vehicle and suffered harm thereby, would not the officer be liable under DeShaney's "special relationship" theory for affirmatively causing the driver to stand in the "kill zone" against his will? The DeShaney "special relationship" duty needs to be imposed to the extent of the state's degree of control (via police power) over the individual citizen. The issue should be control and how that control causes harm. This control test is suggested by the language of "*or puts some other similar restraint on an individual's personal liberty by the affirmative exercise of state power such that he cannot act on his own behalf.*" DeShaney at 199-200.

In this case, Ontiveros detained Cravens for questioning. Cravens was not free to leave without Ontiveros' permission. No one was permitted to help Cravens and he could not help himself at this point. These facts show that Ontiveros exercised control over Cravens to a significant degree. Liability should attach to the extent that his official control over Cravens caused harm. Fundamentally, affirmatively exercising control that emanates from the police power should give rise to a duty to properly exercise that control. This principle comes from basic tort law and should be applied here constitutionally.

Of course, Cravens may share some responsibility for being impaired. But it is up to a jury to weigh the evidence and apportion responsibility. As a matter of law, one cannot say that Cravens' harm was all his own fault at the 12 (b)(6) stage. Can we not trust a jury to properly sort these matters? If it were all Cravens' fault and he deserved to die at his own hand, then why did the City fire Ontiveros for incompetence and wilful neglect of duty?

Alternatively, this Court should hold that because Ontiveros had an absolute duty to arrest under the City's "official" DWI policies, Cravens was in a state of de jure or constructive arrest. Therefore, Ontiveros had a DeShaney "special relationship" duty to protect via arrest or at least after detention, return Cravens to the safety of his private aiders.

IV. Once a Duty is Found to Exist, Disposing of the Case Under a 12 (b)(6) Motion is Premature and Wrong.

Ultimately, the district court treated the conduct of the officer as an isolated incident, not properly attributable to the City. (App. 16a). However, once this Court resolves the duty issue, petitioners should be allowed to advance beyond the 12 (b)(6) stage and conduct full-blown discovery to see how the customs, practices and policies of the City led to the officer's manifest incompetence and wilful neglect of duty. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (A 12 (b)(6) motion should not be granted or affirmed unless it appears to a certainty that the plaintiffs would not be entitled to recover under any state of facts that could be proved to support the claim).

The district court did not consider that Cravens had a brother on the City's police force. Apparently, this relationship caused Ontiveros to extend a "special favor" to Cravens' police

officer brother by not arresting Cravens. Petitioners pleaded that the City apparently had an unwritten policy or practice of allowing officers to extend "don't arrest" "special favors" to family members of fellow law enforcement officers. (App. 32a). This unwritten policy or practice may have motivated Ontiveros to release Cravens. Thus, there is a plausible link between the policies and practices of the City and Ontiveros' manifest incompetence and wilful neglect of duty.

CONCLUSION

Had the Fifth Circuit chosen to submit itself to the authority of this Court's DeShaney opinion and the persuasive authorities of her sister courts, it would not be necessary for petitioners to seek relief here. Petitioners greatly appreciate the workload of this Court. However, the Fifth Circuit refuses to change its course and therefore, petitioners have no choice but to ask this Court for relief. Beyond the needs of petitioners, this case gives the Court an excellent opportunity to resolve the current and ongoing conflict over the "state-created danger" theory. Please grant the petition and after review resolve the conflict by reversing the judgment of the United States Court of Appeals for the Fifth Circuit and remanding the case to the district court for further proceedings consistent with this Court's opinion and rulings.

Respectfully submitted,

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June 11, 2007

APPENDICES

A. Opinion of U.S. Court of Appeals for the Fifth Circuit (March 16, 2007) 1a

B. Opinion of U.S. District Court for the Southern District of Texas (February 28, 2006) 3a

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APPENDIX A

Entry Date:
March 16, 2007

UNITED STATES COURT
OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 16, 2007
Charles R. Fulbruge, III
Clerk

No. 06-40736

MARIE INEZ CRAVENS, Individually and on Behalf of the Estate of Abner Cravens, Deceased and all Wrongful Death and Survival Action Beneficiaries; TONY CRAVENS; NATASHA CRAVENS; LORRETA CRAVENS, as next Friend of L C, a minor,

Plaintiffs-Appellants,

versus

CITY OF LA MARQUE, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
Docket No. 3:05-CV-545

Before JONES, Chief Judge, and JOLLY and STEWART, Circuit Judges.

PER CURIAM:*

The court has heard oral argument and reviewed the briefs and pertinent portions of the record. As the district court found, the appellants failed to establish that a § 1983 cause of action exists in the Fifth Circuit on the state-created-danger theory under these facts. See Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir. 1999). Accordingly, there can be no municipal liability.

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B

Date of Entry: February 28, 2006

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Marie Cravens, et al.,

Plaintiffs,

v. Civil Action No. G-05-545

City of La Marque, Texas,
Defendant

Order Granting Defendant City of La Marque's Motion to Dismiss for Failure to State a Claim

This case arises out of alleged misconduct by former City of La Marque police officer Richard Ontiveros ("Ontiveros"), who failed to take Abner Cravens ("Cravens") into custody for driving while intoxicated even though he allegedly had probable cause to do so. Plaintiffs are Cravens's survivors and representatives of the estate. They bring their claims against the City of La Marque ("the City") under 42 U.S.C. § 1983 for alleged violations of Cravens's constitutional rights. Now before the Court is the City's Motion to Dismiss for Failure to State a Claim pursuant to FED. R. CIV. P. 12(b)(6). For the reasons stated below, the City's Motion is **GRANTED**, and

Plaintiffs' claims against the City are hereby **DISMISSED WITH PREJUDICE.** [1]

I. Background

Plaintiffs allege that Cravens was denied substantive due process and equal protection under the Fourteenth Amendment to the United States Constitution. Plaintiffs claims are based on the alleged misconduct of Officer Ontiveros, who at the time of the events giving rise to this lawsuit was employed as a police officer by the City. Plaintiffs claim that the City is directly liable for the actions of Officer Ontiveros based on its policies, customs, and practices, which resulted in the violation of Cravens's constitutional rights and resulted in his untimely death. The tragic facts of this case are laid out below.[2]

Plaintiffs allege that around 5:30 p.m., on or about October 13, 2003, Cravens was driving his vehicle in La Marque, Texas, when he rear-ended another motor vehicle driven by Rosezelia Sonnier ("Sonnier"), who also happened to be his cousin. After the accident occurred, Sonnier and others were concerned about Cravens's well-being because he appeared to be intoxicated, and they called the La Marque Police Department. Police arrived at the scene of the accident shortly

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1 This Court does not consider this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

2 Since this is a Motion to Dismiss, the Court must consider the facts as they have been presented by Plaintiffs. Accordingly, the Court has laid out the facts as alleged in Plaintiffs' Complaint, but makes no judgment as to their accuracy.

thereafter, and Officer Ontiveros conducted an investigation.[3] Plaintiffs claim that Officer Ontiveros was advised at the scene that Cravens was intoxicated and that he required help, and that Officer Ontiveros knew that Cravens was intoxicated based on his own personal observations. Next, Plaintiffs claim that Officer Ontiveros told Cravens's family and others that he had the situation under control, that he would handle the situation, and that their involvement "was no longer needed, necessary, or allowed." As a result, all of the people that would have helped Cravens left his "well-being" in the hands of Officer Ontiveros. Additionally, Plaintiffs claim that Officer Ontiveros had probable cause to arrest Cravens for driving while under the influence of alcohol, but instead, released Cravens and allowed him to continue to drive his vehicle in his intoxicated state, posing a danger to himself and others.

Shortly after Officer Ontiveros released Cravens, he was involved in a second accident. Cravens crossed the center line and ran head-on into oncoming traffic. Cravens suffered injuries that ultimately lead to his death several days later. Plaintiffs allege that had Officer Ontiveros not told them that he had the situation under control, they would have made sure Cravens was driven from the scene and given proper medical care. Essentially, Plaintiffs claim that but for the actions of Officer Ontiveros, Cravens would still be alive.

Plaintiffs originally filed suit against the City and Officer Ontiveros. That cause of action was dismissed on July 11,2005 because Plaintiffs' Counsel failed to appear at the Rule 16 Scheduling Conference. On July 25, 2005, Plaintiffs moved to reopen the case as to Officer Ontiveros only. The Court granted

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[3] Plaintiffs do not mention any other La Marque police officers in their Complaint.

that motion and the case was reopened as to Officer Ontiveros.[4] On October 12, 2005, Plaintiffs filed a separate suit against the City concerning the same events. On November 16, 2005, the City filed its Motion to Dismiss for Failure to State a Claim. After thoughtful consideration of the City's Motion, Plaintiff's Response thereto, and applicable law, the Court concludes that the City's Motion to Dismiss is hereby **GRANTED**.

II. Motion to Dismiss for Failure to State a Claim

A party is entitled to dismissal under FED. R. CIV. P. 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. Rule 12(b)(6) dismissal is appropriate when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002); *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). When considering a motion to dismiss for failure to state a claim, the Court accepts as true all well-pleaded allegations in the complaint, and views them in the light most favorable to the plaintiff. *See Scanlan v. Texas A&M University*, 343 F.3d 533, 536 (5th Cir. 2003); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (noting that a court must construe the complaint liberally in favor of the plaintiff). *See also Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993). "A motion to dismiss under Rule 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Collins*, 224 F.3d at 498 (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982).

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[4] Cause No. 3:05-cv-00222, Cravens, et al. v. Richard Ontiveros.

Although all doubts are resolved in the plaintiff's favor, a plaintiff still must plead specific facts to avoid dismissal for failure to state a claim; a court may not accept as true conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint. See *Tuchman*, 14 F.3d at 1067; *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "'[A] statement of facts that merely creates a suspicion that the pleader might have a right of action' is insufficient." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quoting 3 CHARLES ALAN WRIGHT &ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1216 at 163). Dismissal is appropriate if the complaint lacks factual allegations regarding required elements necessary to obtain relief. Id. (citing 2A MOORE'S FEDERAL PRACTICE ¶ 12.07 [2.-5] at 12–19 (footnote omitted)).

Additionally, in considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings. *See Scanlan*, 343 F.3d at 536–37. In their Response, Plaintiffs invite the Court to consider briefs and exhibits that have been submitted in their lawsuit against Officer Ontiveros in his individual capacity. *See* Defendant's Motion for Summary Judgment, Cravens, et al. v. Ontiveros, Cause No. 3:05-cv-222. Those exhibits have no bearing on the Court's determination of the sufficiency of Plaintiffs' Complaint to state a claim for which relief can be granted against the City, and they will not be considered. Only in narrow circumstances are documents beyond the pleadings themselves considered by a court in ruling on a Rule 12(b)(6) motion. *See Scanlan*, 343 F.3d at 536–37. This case does not fall within those parameters, and the City's Motion to Dismiss will be based solely on the pleadings.

III. Analysis

A. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a cause of action for those who have been deprived of their federal rights under color of law. Section 1983 does not create any substantive rights, rather, it "simply provides a remedy for the rights that it designates." *Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989). The assertion of an underlying constitutional or federal statutory violation is a predicate to liability under § 1983. *See Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). A municipality will only be held liable for the violation of a plaintiff's constitutional rights if the municipality's policies were the moving force behind the constitutional violation. *See Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) ("*Piotrowski II*") (citing Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658, 690–94, 98 S. Ct. 2018, 2035–37, 56 L. Ed. 2d 611 (1978)).

Plaintiffs premise their § 1983 claims upon the following constitutional violations: (1) violation of Cravens's substantive due process rights under the Fourteenth Amendment to the United States Constitution arising from a special relationship as established in the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Sevs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); (2) violation of Cravens's substantive due process under the Fourteenth Amendment to the United States Constitution arising under the state-created danger theory; and (3) violation of Cravens's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The sufficiency of Plaintiffs' claims against the City with respect to each alleged constitutional violation will be analyzed individually. Each analysis will require a two-part inquiry: (1) have Plaintiffs alleged facts

which, if true, amount to a constitutional violation, and (2) have Plaintiffs alleged that a policy or custom of the City was the moving force behind the constitutional violation.

A. Substantive Due Process

In general, municipalities are under no affirmative duty to provide protection to private citizens. "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *Id.* at 196, 109 S. Ct. at 1003. "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004. However, there are exceptions. The Constitution imposes a duty to protect individuals in two limited circumstances: (1) when the state has a special relationship with a person; or (2) when the state exposes a person to a danger of its own creation (a "state-created danger"). *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995) ("*Piotrowski I*") (citing *Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs argue both that Officer Ontiveros created a special relationship with Cravens and therefore had a duty to protect him, and that Officer Ontiveros subjected Cravens to a state-created danger by cutting off a private source of aid.

1. Special Relationship

"[I]n certain limited circumstances, the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. This is known as the "special relationship" exception. Under this exception, the state has a constitutional duty to protect an individual from known

threats of harm by private actors. *See Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004); *Priester v. Lowndes County*, 354 F.3d 414, 421–22 (5th Cir. 2004). The affirmative duty only arises when the state acts to restrain an individual through incarceration, institutionalization or puts some other similar restraint on an individual's personal liberty by the affirmative exercise of state power such that he cannot act on his own behalf. *See McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002); *Walton v. Alexander*, 44 F.3d 1297, 1303–04 (5th Cir. 1995). *See also DeShaney*, 489 U.S. 199–200, 109 S.
Ct. at 1005–06.

Plaintiffs have failed to allege any facts in their Complaint that would support a cause of action under the special relationship exception. First, there is no allegation that Cravens was institutionalized, incarcerated or in any other way restrained his freedom. *See McClendon*, 305 F.3d at 324. In fact, it was Officer Ontiveros's failure to arrest is the keystone to Plaintiffs' claims. Cravens was only detained for the purpose of investigating the accident, and he was then permitted to drive away. In *Beltran v. City of El Paso*, the Fifth Circuit emphasized that the state actor must affirmatively place the individual into custody and restrain the individual's freedom for the special relationship exception to apply. *See Beltran*, 367 F.3d at 307 (finding that the actions of a 911 operator encouraging a caller to stay in the bathroom and telling her that police were on their way did not establish a special relationship or that the operator became the custodian of the caller's safety).

Second, there is no allegation that Officer Ontiveros prevented Cravens from acting on his own behalf. Officer Ontiveros merely let Cravens return to the activities in which he was engaged directly before coming into contact with the police. Whether Cravens could act on his own behalf given his

alleged state of intoxication is irrelevant. Cravens's intoxicated state was due to his own voluntary actions, and his intoxication alone does not give rise to a special relationship with Officer Ontiveros. There was no special relationship between Cravens and Officer Ontiveros and therefore no constitutional violation. As such, there can be no claim against the City, for if a person has not suffered a constitutional injury, whether the City's regulations might have authorized the conduct is beside the point. *See Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573, 89 L. Ed. 2d 806 (1986). Plaintiffs claim against the City premised on the special relationship theory is hereby
DISMISSED WITH PREJUDICE.

2. State Created Danger Under Substantive Due Process

The validity of the state-created danger theory is uncertain in the Fifth Circuit, which has repeatedly declined to recognize state-created danger as a trigger of affirmative duties under the Due Process Clause. *See Beltran*, 367 F.3d at 307; *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003). However, on numerous occasions the Fifth Circuit has recognized and discussed the existence and elements of the doctrine, as well as its acceptance in other Circuits. *See id.*; *Scanlan*, 343 F.3d at 538; *Randolph v. Cervantes*, 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I*, 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 521 (5th Cir. 1994). Additionally, the Circuit has discussed what a plaintiff would be required to show to prevail on such a theory. To survive Rule 12(b)(6) dismissal, a plaintiff must allege facts sufficient to show: (1) that the state actor increased the danger to the individual, and (2) that the state actor acted with deliberate indifference to the plight of the plaintiff. *See Rivera*, 349 F.3d at 249; *Scanlan*, 343 F.3d at 537–38; *Piotrowski I*, 51 F.3d at

515. "The key to the state created danger cases...lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson*, 38 F.3d at 201 (quotations and citations omitted). In *Scanlan*, the Circuit expressly noted that despite the theory's uncertain viability, a district court should treat such claims as valid on a motion to dismiss, and analyze them accordingly. *See Scanlan*, 343 F.3d at 538.

According to the facts as alleged, Officer Ontiveros prevented Cravens's cousin and others from rendering aid to Cravens at the scene of the first accident by telling them that "he had the situation in hand and that he would take care of the situation." By making representations that Cravens would be taken care of, he cut off a potential source of aid, and discouraged Cravens's family and others from looking out for the safety of Cravens. Plaintiffs claim that but for Officer Ontiveros's representations, Cravens's family and others would have intervened to see that Cravens arrived home safely. These facts, as alleged, demonstrate that by cutting off a potential source of aid, Officer Ontiveros created a situation where Cravens was in greater danger than he would have otherwise been.[5]

Whether the facts support the second requirement, that Officer Ontiveros acted with deliberate indifference, presents a more difficult question. There is a significant distinction between a tort and a constitutional wrong. *See Lefall v. Dallas Ind. Sch. Dist.*, 28 F.3d 521, 532 (citing *de Jesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the

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[5] The Court again notes that the facts alleged must be taken as true.

Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon*, 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a state actor is merely negligent in causing the injury, no procedure for compensation is constitutionally required. Id. Reckless and grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides*, 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

Deliberate indifference is a "lesser form of intent rather than a heightened form of negligence." *Lefall*, 28 F.3d at 531 (internal quotations omitted). It involves a higher degree of certainty than gross negligence. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 433, 453 (5th Cir. 1994). "Deliberate indifference requires that the state actor both knew of and disregarded an excessive risk to the victim's health and safety." *Beltran*, 367 F.3d at 307 (citing *McLendon*, 305 F.3d at 326 n.8). Plaintiffs' argue that by failing to arrest Cravens when he was intoxicated and by cutting off private sources of protection, Officer Ontiveros acted with deliberate indifference toward the safety and well being of Cravens. Plaintiffs rely upon a case from the Third Circuit, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), for this argument. In that case, an intoxicated woman was walking home with her husband when the couple was stopped by police officers who later told the husband to go home. Id. at 1201–03. The husband left while his wife was resting on the hood of a police vehicle in the presence of several officers. After his wife did not return home, he went to look for her and came across the police officers he had been with earlier. When he asked about her whereabouts, an officer told him to "get out of here" before he was locked up. The

husband left again upon the instruction of the officer. His wife was later found in a ditch where she suffered hypothermia causing permanent brain damage. In that case, the Third Circuit found that the plaintiffs had "adduced sufficient evidence to raise a material issue as to whether [the officers] had acted in wilful disregard for [her] safety." Id. at 1208. The validity of Kneipp in this Circuit is far from certain. However, given the deference owed to a plaintiff on a motion to dismiss, the Court assumes without deciding that given the facts as alleged (that Officer Ontiveros knew that Cravens was intoxicated, permitted him to drive away from the scene of the accident and that he cut off private sources of aid), Plaintiffs have alleged sufficient facts to support their claim that Officer Ontiveros knew and disregarded an excessive risk to Cravens's safety.[6]

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The Court has doubts as to whether the act of allowing a drunk driver to continue driving after already committing one accident, and where people are offering to render him aid, actually amounts to deliberate indifference given the Supreme Court's recent decision in Town of Castle Rock, Colo. v. Gonzalez, __ U.S. __, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005), and the Fifth Circuit's decision in Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir. 1999). In Castle Rock, the Supreme Court recognized the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." Castle Rock, __ U.S. __, 125 S. Ct. at 2805-06. In Saenz, the Fifth Circuit found that "neither the text nor the history of the Due Process Clause supports holding that an officer who orders another officer to refrain from arresting a suspected drunk driver has committed a constitutional tort," and that a state officer "cannot offend due process by permitting an intoxicated driver to remain on the highway, thereby increasing the risk of harm to unidentified and unidentifiable members of the public." Saenz, 183 F.3d at 391, 392. For the purposes of this Motion, and given the absence of any directly-controlling authority, the Court will assume that Officer Ontiveros's actions amounted to deliberate indifference. However, the Court also recognizes

Therefore, Plaintiffs have stated facts sufficient to show a constitutional violation by Officer Ontiveros under the state-created danger theory.[7] The next inquiry is whether the City's policies or customs were the "moving force" behind the alleged violation. If not, then Plaintiffs' claim against the City must fail as a matter of law.

In suits against a city, "a plaintiff must demonstrate that a [city] 'policy' was the 'moving force' behind the constitutional violation." *In re Foust*, 310 F.3d 849, 861 (5th Cir. 2002) (citing *Brown v. Bryan County, Okla.*, 219 F.3d 450, 457 (5th Cir. 2000)). To prove a violative policy or practice, a plaintiff must show that "(1) the local government or official promulgated a policy; (2) the decision displayed 'deliberate indifference' and proved the government's culpability; and (3) the policy decision lead to the particular injury." *Id.* The Supreme Court has said that "locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of County Comm'rs v. Brown*, 520 U.S. at 403-04 (citing *Monnell*, 436 U.S. 658, 98 S. Ct. 2018).

At this stage in the case, Plaintiffs do not need to prove a county custom or policy. Rather, they must allege facts which, if true, state a claim for which relief can be granted. Plaintiffs have failed to allege any facts showing that the allegedly

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that this questions presents a difficult policy decision best left to the purview of the Fifth Circuit, and not a district court.

[7] The Court notes that this conclusion is aided by the fact that on a motion to dismiss for failure to state a claim the facts as alleged must be construed in a light most favorable to the plaintiff and all facts as alleged are to be taken as true.

unconstitutional action of Officer Ontiveros was carried out pursuant to the official policies and customs of the City. Plaintiffs essentially describe a "single incident" in which Officer Ontiveros exercised poor judgment. See Campbell, 43 F.3d at 977. There are no facts in the Complaint to support Plaintiffs' allegations of any of the following customs or policies on the part of the City: (1) failure to train police officers on their duties when confronted with intoxicated drivers; (2) failure to timely review and enforce the City's policies and procedures; (3) allowing discretion on arresting intoxicated drivers; and (4) allowing police officers to extend "special favors" to family members of law enforcement officers even when those "special favors" would result in failing to protect individuals such as Cravens and the public at large.[8] These are all conclusory allegations without any supporting facts. Furthermore, Plaintiffs' have failed to assert any facts which would show that any of these policies were the "moving force" behind Officer Ontiveros's decision not to arrest Cravens, or that Officer Ontiveros's poor decision on that evening was anything more than an isolated incident. For these reasons, Plaintiffs' claim against the City under the state-created danger theory is hereby **DISMISSED WITH PREJUDICE**.

B. Equal Protection Claim

The Equal Protection Clause requires similar treatment of all persons similarly situated. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985). A party who wishes to make out an equal protection claim must prove the existence of purposeful

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[8] There are not even any facts indicating that Officer Ontiveros was granting anyone a "special favor" by failing to arrest Cravens.

discrimination motivating the alleged state action. *See Washington v. Davis*, 426 U.S. 229, 246-50, 96 S. Ct. 2040, 2051–52, 48 L. Ed. 2d 597 (1976); *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 276 (5th Cir. 2000); *Vera v. Tue*, 73 F.3d 604, 609–10 (5th Cir. 1996). To establish a claim of selective law enforcement, a plaintiff must show that selective enforcement was deliberately based upon an unjustifiable standard, such as race or religion. *See Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir. 2003).

Plaintiffs assert that "[b]ut for [Cravens's] status as an African-American, Officer Ontiveros would have properly arrested [him] in order to protect him." The City argues that this claim is unsupported and conclusory. The Court agrees. There are no facts in the Complaint to support an equal protection violation. There are no facts supporting an inference that the decision not to arrest Cravens was based on race. There are no facts showing or even alleging that similarly situated individuals of other groups outside Cravens' class were arrested under the same circumstances, nor are there any facts to support any inference of purposeful discrimination on the part of Officer Ontiveros. Plaintiffs have failed to allege any facts supporting any theory of racial discrimination, bias, or prejudice, or that race had anything to do with Officer Ontiveros's decision not to arrest Cravens. The unsupported allegation merely creates a suspicion that Plaintiffs might have a right of action, and that alone is insufficient to survive a motion to dismiss for failure to state a claim. *See Campbell*, 43 F.23d at 975.

Additionally, the Fifth Circuit has noted that "the Equal Protection Clause should not be used to make an end-run around the *DeShaney* principle that there is no constitutional right to state protection for acts carried out by a private actor." *Beltran*, 367 F.3d at 304. A plaintiff cannot circumvent the rule

of *DeShaney* with an unsupported allegation that a police officer exercised his discretion to arrest in one incident but not in another based on race. *See McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989). Yet, this is exactly what Plaintiffs are trying to do. There are no alleged facts supporting the assertion that Officer Ontiveros selectively enforced the drunk driving laws on any impermissible ground. *See Woodard v. Andrus*, 419 F.3d 348, 354 (5th Cir. 2005).

As such, Plaintiffs equal protection claim against the City must fail. If there is no constitutional injury at the hands of the police, then the question whether any departmental policies or customs might have authorized the conduct is moot. *See Los Angeles v. Heller*, 475 U.S. at 799, 106 S. Ct. at 1573. Plaintiffs' equal protection claim against the City is hereby **DISMISSED WITH PREJUDICE**.

IV. Conclusions

Plaintiffs have failed to allege facts sufficient to support their claims against the City. For the reasons stated above, the City's Motion to Dismiss for Failure to State a Claim is **GRANTED**. All of Plaintiffs' claims against the City are **DISMISSED WITH PREJUDICE**. A Final Judgment will be issued contemporaneously with this Order. Each Party is to bear its own taxable costs, expenses, and attorneys' fees incurred herein to date.

IT IS SO ORDERED.

DONE this 28th day of February, 2006, at Galveston, Texas.

s/_____
Samuel B. Kent
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Marie Cravens, Individually and on behalf of the Estate of Abner Cravens, Deceased and All Wrongful Death and Survival Action Beneficiaries, Tony Cravens, Natasha Cravens, and Lorreta Cravens, as next Friend of Lakeiya Cravens, a Minor

vs. Civil Action No. 03:05-cv-545
(Jury Requested)

City of La Marque, Texas

Plaintiffs Marie Cravens', Tony Cravens', Natasha Cravens' and Loretta Cravens' Original Complaint

1. COME NOW PLAINTIFFS MARIE CRAVENS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ABNER CRAVENS DECEASED AND ALL WRONGFUL DEATH AND SURVIVAL ACTION BENEFICIARIES, TONY CRAVENS, NATASHA CRAVENS AND LORETTA CRAVENS, AS NEXT FRIEND OF LAKEIYA CRAVENS, A MINOR ("the Cravens"), complaining of and seeking money damages from the CITY OF LA MARQUE, TEXAS ("City of La Marque"), Defendant, for personal injuries arising from a vehicular accident which occurred on or about October 13, 2003 on the grounds that (1) City of La Marque is directly liable for the actions of Officer Ontiveros based on its policies, customs and practices which resulted in the

violation of Abner Cravens' constitutional rights (Fourteenth Amendment substantive due process right, liberty interest in personal security and equal protection) resulting in his untimely death. See DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); Kneipp v. Tedder, 95 F.3d. 1199 (3d Cir. 1996)(held police officers action of stopping an obviously intoxicated pedestrian walking home from a bar and releasing her to go home alone in cold weather could qualify as the requisite affirmative action for purposes of a state-created danger claim under 42 U.S.C. § 1983). For cause of action, Plaintiffs would show the following:

I.
Parties

2. Maria Inez Cravens is a natural person and resided in Galveston County, Texas at the time the cause of action that is the basis of the suit accrued. She is the natural mother of Abner Cravens, Deceased. She is the administrator of the Estate of Abner Cravens, Deceased and authorized to pursue this action on behalf of the Estate, all heirs of the Estate and all wrongful death and survival action beneficiaries. The Estate of Abner Cravens, Deceased arose upon his untimely death on or about October 22, 2003. Abner Cravens' natural father predeceased Abner Cravens. Maria Inez Cravens is the only surviving natural parent.

3. Tony Cravens is a natural person and resided in Galveston County, Texas at the time the cause of action that is the basis of the suit accrued. Tony Cravens is of majority age and is the natural son of Abner Cravens, Deceased. As such, he is a surviving child and a wrongful death

beneficiary and heir of the Estate of Abner Cravens, Deceased.

4. Natasha Cravens is a natural person and resided in Galveston County, Texas at the time the cause of action that is the basis of the suit accrued. Natasha Cravens is of majority age and is the natural daughter of Abner Cravens, Deceased. As such, she is a surviving child and a wrongful death beneficiary and heir of the Estate of Abner Cravens, Deceased.

5. Lakeiya Cravens is a natural person and minor and resided in Galveston County, Texas with her mother natural parent or legal guardian, Loretta Cravens at the time the cause of action that is the basis of the suit accrued. Loretta Cravens brings this action on behalf of Lakeiya Cravens. Abner Cravens, Deceased is the natural parent of Lakeiya Cravens. Abner Cravens was not married to anyone at the time of his death. Lakeiya Cravens is a surviving child and a wrongful death beneficiary and heir of the Estate of Abner Cravens, Deceased. There are no other surviving children of Abner Cravens, Deceased.

6. City of La Marque, Texas is a municipality with its principal place of business located in Galveston County, Texas and whose designated agent for service of process in the State of Texas is the City Manager or other authorized officer of the city government. ***City of La Marque may be served with summons, a true and correct copy of this Complaint at 1111 Bayou Road, La Marque, Texas 77568. Request is hereby made that the clerk of the court process the summons prepared for service, return same to the undersigned counsel so that the summons and complaint can be properly served pursuant to the Federal Rules of Civil Procedure to the person and location indicated herein***.

II.
Subject Matter Jurisdiction

7. This action arises under the United States Constitution, particularly the Fourteenth Amendment and under federal law, particularly 42 U.S.C. §§ 1983 and 1988. This Court is vested with original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331 and 1343, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims arising under the Constitution and laws of Texas. This Court is authorized to award attorneys fees pursuant to 42 U.S.C. § 1988.

III.
Personal Jurisdiction

8. The court has personal jurisdiction over Plaintiffs by virtue of Plaintiffs filing this Complaint with the clerk of the court. The court has personal jurisdiction over Defendant pursuant to proper service of summons with a copy of this Complaint and the fact that the City of La Marque is geographically located in Texas and exists under the laws of Texas.

IV.
Venue

9. Venue is proper in the United States District Court for the Southern District of Texas Galveston Division under 28 U.S.C. § 1391(b), in that the City of La Marque is located and resides in the Galveston Division and a substantial part of the events or omissions giving rise to the claim occurred in the Galveston Division; to wit: the wrongful actions of the Defendant took place in the Galveston Division, the accident which lead to the death of Abner

Cravens, Deceased occurred in the Galveston Division and Abner Cravens died in the Galveston Division.

V.
Factual Background

10. At about 5:29 p.m., on or about October 13, 2003, Abner Cravens was driving his vehicle in La Marque, Texas and rear-ended another vehicle driven by Rosezelia Sonnier, who happened to also be Abner Cravens' cousin. After the accident, Ms. Sonnier and others were concerned about the physical safety of Abner Cravens because Cravens appeared to be intoxicated. Out of concern for Abner Cravens safety, the La Marque police were called. The La Marque police came to the scene. Officer Ricardo Ontiveros investigated the accident. While at the scene, Officer Ontiveros was advised that Abner Cravens was apparently intoxicated and that Cravens needed to be helped. Officer Ontiveros also observed the condition of Cravens and knew that Abner Cravens was in no condition to continue to drive his vehicle. Officer Ontiveros advised those at the scene that he had the situation in hand and that he would take care of the situation. Those at the scene believed Officer Ontiveros and left the well-being of Abner Cravens in the hands of Officer Ontiveros. Officer Ontiveros detained Abner Cravens for questioning for several minutes. Officer Ontiveros had probable cause to arrest and take into custody Abner Cravens for driving while under the influence, but failed to do so. Thereafter, Officer Ontiveros released Abner Cravens and allowed him to continue driving his vehicle even though Abner Cravens was obviously intoxicated and posed a danger to himself and others. Officer Ontiveros used his authority as a police officer to create a dangerous situation or to make Abner Cravens more vulnerable to danger had

Officer Ontiveros not intervened; to wit: family members and other concerned citizens were at the scene and were in the process of helping and protecting Abner Cravens from himself. Thereafter, Officer Ontiveros advised that he would lookout for the well-being of Cravens and actively used his authority as a police officer to discourage and prevent others from otherwise protecting Abner Cravens from himself. The conduct of Officer Ontiveros in discourage and preventing others from helping Abner Cravens and in detaining Abner Cravens and then releasing him to drive his vehicle unescorted in a seriously intoxicated state made Abner Cravens vulnerable to harm. It is very much conceivable and probable that but for the intervention of Officer Ontiveros, Abner Cravens' family members, friends and concerned citizens in the small community of La Marque, Texas would have continued looking out for the safety of Abner Cravens and made sure that he was driven from the scene and given proper medical care where he would have been safe. Abner Cravens was in a worse position after Officer Ontiveros intervened than Abner Cravens would have been had Officer Ontiveros not done so. As a result of the affirmative acts of Officer Ontiveros, the danger or risk of injury to Abner Cravens was greatly increased; to wit: Officer Ontiveros intervened and cut off Abner Craven's private source of protection by advising others at the scene that he would properly handle the situation and that their involvement was no longer needed, necessary or allowed, thereby increasing the danger that Abner Cravens would suffer harm in his visibly intoxicated state when Officer Ontiveros wilfully and with deliberate indifference abandoned Abner Cravens and allowed him to drive away from the scene. In so acting, Officer Ontiveros acted with wilful disregard for the safety and well-being of Abner Cravens, Deceased and with deliberate indifference to the

safety and well-being of Abner Cravens. The circumstances of the case show that a relationship existed between the state and Abner Cravens whereby Officer Ontiveros exerted sufficient control over Abner Cravens that resulted in Officer Ontiveros placing Abner Cravens in danger of foreseeable injury. This relationship was sufficient to establish a duty on the part of Officer Ontiveros to protect Abner Cravens under the "state-created danger" theory of liability or alternatively or in addition to the "state-created danger" duty, a special relationship existed between the state and Abner Cravens by virtue of private citizens (who were helping Abner Cravens) transferring their helpful efforts over to Officer Ontiveros which gave rise to a duty to protect Abner Cravens under DeShaney. Officer Ontiveros knew that Abner Cravens was intoxicated and was not capable of safely operating his vehicle. Shortly after being released by Officer Ontiveros, Abner Cravens was involved in another car accident which was very severe and resulted in injuries to Abner Cravens from which he ultimately died several days later. Abner Cravens crossed the center line and ran head-on into oncoming traffic. As a direct and proximate result of the wrongful action of Officer Ontiveros, Abner Cravens suffered severe injuries which ultimately lead to his untimely death. Plaintiffs seek and demand recovery for all damages alleged and prayed for herein including but not limited to general damages allowed by law, both incurred in the past and which Plaintiffs will incur in the future based on reasonable probability, and special damages incurred or reasonably likely to be incurred in the future.

VI.
Causes of Action

11. All acts of the Defendant, their officers, agents, servants, employees, or persons acting at their behest or direction, were done under the color and pretense of state law, including the ordinances, regulations, customs, policies and usages of the City of La Marque.

A.
Liability of Officer Ontiveros

1. 42 U.S.C. § 1983 Liability for Violating Abner Cravens' Fourteenth Amendment Substantive Due Process Rights to Life, Liberty and Personal Security

12. The above paragraphs are incorporated herein by reference as if set forth herein verbatim.

13. At all relevant times, Abner Cravens, Deceased was vested with, possessed and guaranteed by the Fourteenth Amendment to the United States Constitution the substantive due process rights to life, liberty and personal security. Officer Ontiveros owed a duty to Abner Cravens, Deceased to protect Cravens substantive due process rights under these circumstances. Officer Ontiveros breached this duty and violated Cravens' substantive due process rights. Ontiveros' breach of his duty owed to Cravens was wrongful and proximately caused bodily injuries to Cravens before he died and proximately caused the death of Abner Cravens, Deceased such that Abner Cravens suffered the lose of life, liberty and personal security at the unlawful hand of Officer Ontiveros in violation of Abner Cravens constitutional

rights. Officer Ontiveros is being sued in his individual capacity.

14. When Officer Ontiveros acted wrongfully to the detriment of Abner Cravens, Deceased, he was acting without discretion; to wit: under the circumstances of this case, Officer Ontiveros had no discretion whatsoever and was obligated to arrest Abner Cravens, Deceased and take him into custody and render proper protective care because of the known level of his intoxication. Therefore, Officer Ontiveros does not enjoy any qualified immunity. The act of arresting under the circumstances had been reduced to a mere ministerial task requiring no discretion.

15. To the extent Officer Ontiveros is found to have been acting within the scope of his discretionary authority, nevertheless, Officer Ontiveros still does not enjoy any qualified immunity; to wit: his conduct violated clearly established statutory or constitutional law of which a reasonable person would have known and his conduct was not objectively reasonable under the circumstances. Harlow v. Fitzerald, 457 U.S. 80, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000). The duty to protect citizens after a special relationship is created or when the state subjects a citizen to a "state-created" danger or when a liberty interest has otherwise been infringed has long existed before October 13, 2003. See DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); Kneipp v. Tedder, 95 F.3d. 1199 (3d Cir. 1996)(held police officer's action of stopping an obviously intoxicated pedestrian walking home from a bar and releasing her to go home alone in cold weather could qualify as the requisite affirmative action for purposes of a state-created danger claim under

42 U.S.C. § 1983). In addition, municipalities in this circuit and in this division have long been aware of the possibility of being held liable under the "special relationship" or "state-created" danger theory of liability under § 1983 and the Fourteenth Amendment for substantive due process and equal protection violations. See Martin v. City of League City, 23 F. Supp 720, 722 (S.D.Tex 1998); McKinney v. Irving Ind. Sch. Dist., 309 F.3d 308, 313 (5th Cir. 2002); McClendon v. City of Columbia, 285 F.3d 1078 (5th Cir. 2002); Piotrowski v. City of Houston, 51 F.3d 512 (5th Cir. 1995). The latest word from the United States Court of Appeals for the Fifth Circuit concerning this type of cause of action appears at Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 880 (5th Cir. 2004) wherein the court once again emphasized that the court has not determined whether or not a state official has a duty to protect under the "state-create danger" theory of liability. The Fifth Circuit Court of Appeals has consistently held that the right to be free of state-occasioned damage to a person's bodily integrity is protected by the Fourteenth Amendment's guarantee of due process. Doe v. Taylor Ind. Sch. Dist., 15 F.3d 443, 450-51 (5th Cir. 1994).

16. Officer Ontiveros is liable to all of the wrongful death beneficiaries pursuant to TEX. CIV. PRAC. & REM. CODE §§ 71.001 thru 71.011 (Vernon 1996) commonly referred to as the Texas Wrongful Death Act to the extent that his wrongful conduct alleged herein proximately resulted in the death of Abner Cravens, Deceased and/or as may be necessary to effectuate proper remedies for the alleged wrongful acts and injuries suffered.

17. The Deceased did not die instantly but rather suffered great pain and physical trauma before his death. As a

result, the Estate of Abner Cravens, Deceased is entitled to damages inflicted upon him by Ontiveros.

18. Ontiveros is liable to the Estate of Abner Cravens, Deceased and all of the survival action beneficiaries pursuant to TEX. CIV. PRAC. & REM. CODE §71.021(Vernon 1996) commonly referred to as the Texas Survival Act to the extent that Ontiveros' wrongful conduct alleged herein proximately resulted in the bodily injuries and suffering of Abner Cravens, Deceased before his death and/or as may be necessary to effectuate proper remedies for the alleged wrongful acts and injuries suffered by Abner Cravens, Deceased. In addition, Ontiveros is liable for wrongfully taking Abner Cravens enjoyment of life.

2. 42 U.S.C. § 1983 Liability for Violating Abner Cravens' Fourteenth Amendment Right to Equal Protection under the Laws

19. The above paragraphs are incorporated herein by reference as if set forth herein verbatim.

20. At all relevant times, Abner Cravens, Deceased was vested with, possessed and guaranteed by the Fourteenth Amendment to the United States Constitution the right to equal protection of the laws regardless of his race. Abner Cravens, Deceased is an African American. Officer Ontiveros owed a duty to Abner Cravens, Deceased to protect Cravens' equal protection rights under these circumstances. Officer Ontiveros breached this duty and violated Cravens equal protection rights. Ontiveros' breach of his duty owed to Cravens was wrongful and proximately caused bodily injuries to Cravens before he died and proximately caused the death of Abner Cravens,

Deceased such that Abner Cravens failed to enjoy equal protection under the law at the unlawful hand of Officer Ontiveros in violation of Abner Cravens' constitutional rights. But for Abner Cravens' status as an African American, Officer Ontiveros would have properly arrested Abner Cravens in order to protect Abner Cravens from himself. In other words, Abner Cravens lost the ability to lookout for his own safety because of his level of intoxication and needed to be protected. Once Officer Ontiveros detained Cravens and cut-off Cravens private means of protection, Officer Ontiveros had an obligation to provide adequate protection but failed to do so because of Cravens' race. Cravens received treatment different from that received by similarly situated individuals and that unequal treatment stemmed from a discriminatory intent or discriminatory indifference. Because of Cravens' race, Officer Ontiveros was indifferent to the protective needs of Cravens and had Cravens not been African American, Ontiveros likely would have protected Cravens under the circumstances. But for Ontiveros' action, Cravens would have not been injured and would still be alive. Ontiveros' unconstitutional actions proximately caused the injuries and untimely death of Abner Cravens, Deceased.

3. Common Law Liability of Officer Ontiveros for Gross Negligence

21. The above paragraphs are incorporated herein by reference as if set forth herein verbatim.

22. As a police officer, Ontiveros owed a duty to Cravens to properly exercise that police authority in good faith. Ontiveros failed to properly exercise that police authority in good faith and such failure proximately caused the

bodily injuries and damages to Abner Cravens. Ontiveros' action was not discretionary under the circumstances. To the extent the action was discretionary, no reasonably prudent official could have believed releasing Cravens under the circumstances of obvious intoxication was consistent with Cravens' rights. Ontiveros' actions were not objectively reasonable. Therefore, he enjoys no "official immunity" under Texas state law.

23. The acts of Ontiveros rose above mere negligence and constituted acts, errors and omissions of gross negligence or malice; to wit: Ontiveros' actions constituted an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others including the Deceased and Plaintiffs in all capacities. The gross negligence of Ontiveros proximately caused the damages complained of herein. Ontiveros was grossly negligent and is liable for all wrongful death and survival action damages allowed by law for gross negligence including but not limited to exemplary damages. Plaintiffs' claims for gross negligence arise from, among other things, the guarantees and protections of the Texas Constitution, Texas statutes, common law of the state of Texas and remedies allowed under 42 U.S.C. § 1983 et seq. and the law governing enforcement of federal constitutional rights.

B.
Liability of the City of La Marque

42 U.S.C. § 1983 Liability for Violating Abner Cravens' Fourteenth Amendment Substantive Due Process Rights to Life, Liberty and Personal Security and Equal Protection

24. The above paragraphs are incorporated herein by reference as if set forth herein verbatim.

25. The unconstitutional action of Ontiveros was carried out pursuant to an official municipal policy or custom of the City of La Marque which resulted in a pattern or practice of failing to properly enforce DWI cases, failing to properly train officers such as Ontiveros on the officers' duties when confronted with obviously intoxicated drivers, failing to timely review and enforce the policies and procedures which the municipality had established, failing to educate officers on the evils of bias and prejudice and the duty to equally enforce the laws regardless of race, failing to timely review officers' conduct to determine the presence of racial bias in the officers, as well as failing to timely review to discover incompetence of police officers, allowing officers discretion on arresting obviously intoxicated drivers, allowing officers to extend so-called "special favors" to family members of law enforcement officers even when extending special favors would result in failing to properly protect persons such as Cravens and pose dangers and risks not only to Cravens but also to members of the general public. To the extent, the City of La Marque in fact had proper policies and customs in place concerning these matters, the City of La Marque failed to properly enforce those policies, procedures and customs. The direct action of the City of La Marque

through its "official policies" constituted either: 1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's law-making officers or by an official to whom the lawmakers have delegated policymaking authority; or 2) a persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984); Morris v. City of Alvin, Texas, 950 F. Supp. 804, 806 (S.D. Tex. 1997). Moreover, the City of La Marque took steps after the accident which constituted a ratification of Officer Ontiveros' wrongful action and proved to be consistent with the City's pattern practice, custom of indifference toward protecting the interests of its citizens. Not until the City of La Marque was put on notice that it might be liable for the conduct of Ontiveros did the City of La Marque take any substantive action to try and protect itself from liability. These efforts were a subterfuge to try and hide the City's direct wrongful conduct that lead to the death of Cravens and Plaintiffs' damages.

VII.
Damages and Prayer for Relief

26. The above paragraphs are incorporated herein by reference as if fully set forth herein verbatim.
27. As a proximate and producing result of the foregoing unlawful actions of the City of La Marque, Plaintiffs demand and pray that the City of La Marque be summoned to appear and answer herein and that after a lawful trial that the court award both special and general

money damages to Plaintiffs and against the City of La Marque in the following particulars:

42 U.S.C. § 1983 & Wrongful Death Damages: Surviving Parent

A. Pecuniary loss damages suffered in the past and in all reasonable probability this Plaintiff will suffer in the future; to wit: $1,000,000 or such other amount that the jury deems fair and just.

B. Loss of companionship and society damages suffered in the past and in all reasonable probability this Plaintiff will suffer in the future; to wit: $5,000,000 or such other amount that the jury deems fair and just.

C. Mental anguish suffered in the past and in all reasonable probability will be suffered in the future; to wit: $5,000,000 or such other amount that the jury deems fair and just.

D. Reasonable and necessary attorneys fees.

E. Costs of court.

F. Pre and post judgment interest as allowed by law.

G. Such other and further relief to which the Wrongful Death beneficiaries may be justly entitled to received at law or in equity both special and general.

42 U.S.C. § 1983 & Wrongful Death Damages: Surviving Children

A. Pecuniary loss damages suffered in the past and in all reasonable probability these Plaintiffs will suffer in the future; to wit: $1,000,000 or such other amount that the jury deems fair and just.

B. Loss of companionship and society damages suffered in the past and in all reasonable probability these Plaintiffs will suffer in the future; to wit: $5,000,000 or such other amount that the jury deems fair and just.

C. Mental anguish suffered in the past and in all reasonable probability will be suffered in the future; to wit: $5,000,000 or such other amount that the jury deems fair and just.

D. Loss of inheritance damages in all reasonable probability these Plaintiffs will suffer in the future; to wit: $1,000,000 or such other amount that the jury deems fair and just.

E. Reasonable and necessary attorneys fees.

F. Costs of court.

G. Pre and post judgment interest as allowed by law.

H. Such other and further relief to which the Wrongful Death beneficiaries may be justly entitled to received at law or in equity both special and general.

42 U.S.C. § 1983 & Survival Damages

A. Physical pain and mental anguish suffered by the Deceased; to wit: $5,000,000 or such other amount that the jury deems fair and just.

B. Reasonable and necessary costs of medical care and treatment including but not limited to doctors, hospital, nurses, medicine and other services and supplies which the Deceased incurred in the past as a result of the injuries sued for herein; to wit: $200,000 or such other amount that the jury deems fair and just.

C. Loss of the enjoyment of life.

D. Reasonable and necessary funeral and burial expenses for the Deceased suitable to his station in life; to wit: $15,000 or such other amount that the jury deems fair and just.

E. Reasonable and necessary attorneys fees.

F. Costs of court.

G. Pre and post judgment interest as allowed by law.

H. Such other and further relief to which the Survival Action beneficiaries may be justly entitled to received at law or in equity both special and general.

Respectfully submitted,

DOLLINGERLAW

/s/_____

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(2)

No. 06-1645

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARIE INEZ CRAVENS, ET AL.,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an alleged drunk driver is denied due process of law by a police officer who fails to arrest the drunk driver who later dies in a fatal car accident and, if so, whether the police officer's municipal employer may be held liable for the officer's isolated conduct?

PARTIES

Petitioners are Marie Inez Cravens, individually and on behalf of the Estate of Abner Cravens, Deceased and all wrongful death and survival action beneficiaries including Tony Cravens, Natasha Cravens and Loretta Cravens, as next friend of L.C., a minor.

Respondent is the City of La Marque, Texas.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporation is a party to this action.

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JURISDICTIONAL STATEMENT

A. Petitioners claim this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

B. The Fifth Circuit Court of Appeals had jurisdiction over Petitioners' appeal from the District Court's final judgment under 28 U.S.C. § 1291. [R 130].

C. The District Court had original jurisdiction over Petitioners' claims under 28 U.S.C. § 1331. [R 5-20; 115-130].

D. The memorandum opinion and Order granting Respondent's motion to dismiss was entered on February 28, 2006. [R 115-129].

E. The District Court entered final judgment in Respondent's favor on February 28, 2006. [R 130].

F. On March 28, 2006, Petitioners filed a notice of appeal of the final judgment entered by the District Court. [R 131-133].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural History

This lawsuit arises from the alleged misconduct of former City of La Marque, Texas police officer Ricardo Ontiveros,[1] who chose not to arrest Decedent Abner Cravens, who was involved in a minor traffic accident. After Officer Ontiveros completed his investigation, the Decedent drove away and was subsequently involved in a second accident in a neighboring city which resulted in the Decedent's death. Petitioners allege the Decedent was intoxicated at the time of both accidents and that Officer Ontiveros

[1] Petitioners do not even mention any other City police officer in their Complaint.

should have prevented the Decedent from driving away after the first accident investigation. [R 5-20; R 115-129].

Petitioners, survivors and representatives of Decedent's estate, brought suit against the City under 42 U.S.C. § 1983 alleging the City denied the Decedent substantive due process of law and equal protection of the laws[2] under the Fourteenth Amendment to the United States Constitution.[3] Petitioners premise their claims upon the contention that a constitutionally protected *special relationship* existed between Officer Ontiveros and the Decedent and that Officer Ontiveros subjected the Decedent to *state created danger*. [R 5-20; R 115-129].

The District Court had original jurisdiction over Petitioners' claims under 28 U.S.C. § 1331. [R 5-20; 115-129]. The City filed a motion to dismiss for failure to state a claim, and accompanying memorandum of law in support thereof, under FED. R. CIV. P. 12(b)(6). [R 26-51]. Petitioners filed a response in opposition to the Defendant's motion to dismiss. [R 59-70]. The City, thereafter, filed a reply to Petitioners' opposition briefing. [R 93-100]. Finding that Petitioners failed to state a claim upon which relief could be granted, the District Court granted the City's motion to dismiss and entered final judgment in favor of the City. [R 115-130]. Petitioners filed a notice of appeal. [R 131-132].

B. Petitioners' Allegations

In their brief in the Fifth Circuit Court of Appeals, Petitioners succinctly set out their claim: "[T]he heart of

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[2] The Petitioners abandoned their appeal of the dismissal of the Equal Protection claims. [Petitioners' Brief in the Court of Appeals at p. 12].

[3] Petitioners brought claims against former Officer Ontiveros in a different lawsuit.

the Complaint against Officer Ontiveros can be simply stated; he knew that [Decedent] was obviously intoxicated, cut-off private sources of aid and permitted [the Decedent] to drive away." [Petitioners' Brief in the Fifth Circuit Court of Appeals at p. 6]. Petitioners therefore admit their claims are based upon the sole contention that Officer Ontiveros did nothing more than release the Decedent from the officer's investigatory presence in an alleged intoxicated state. [Petitioners' Petition at pp. 3-6; Brief at p. 6].[4]

More specifically, Petitioners alleged in their Complaint that the Decedent drove his vehicle into the rear of his cousin's vehicle on a public roadway in the City of La Marque. The Decedent's cousin was concerned for the Decedent's safety because he appeared to be intoxicated so she called the police. Officer Ontiveros investigated the accident, was told the Decedent was "apparently intoxicated" and needed help. Officer Ontiveros observed the Decedent's condition and knew he was in no condition to drive. Officer Ontiveros informed those at the scene he would take care of it. Those at the scene believed Officer Ontiveros' assurance and left the Decedent's well being in Officer Ontiveros' hands.

Officer Ontiveros detained the Decedent for questioning for only minutes. Although the officer had probable cause to arrest the Decedent for driving while intoxicated, Officer Ontiveros failed to arrest the Decedent. Instead, after the accident investigation, the Decedent drove away in an intoxicated state posing a danger to himself and

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[4] The foundation of Petitioners' claims implodes because it rests entirely upon the invalid legal premise that a police officer has a ministerial duty to arrest every potentially drunk driver he encounters. [Petitioners' Brief].

others. Family members and other concerned individuals were on the scene of the initial accident and were in the process of helping and protecting the Decedent from himself when Officer Ontiveros arrived.[5] Shortly after being released to drive away from the accident in La Marque, the Decedent drove his vehicle head on into another car and the Decedent died in the second accident. [R 8-11].

Petitioners further allege that Officer Ontiveros had no discretion but, instead, was obligated to take custody of the Decedent and render him protective care because of his known level of intoxication. According to Petitioner, under the circumstances, the act of arresting the Decedent had been reduced to a mere ministerial task. [R 12].

Although Petitioners claim the City is responsible for Officer Ontiveros' failure to seize the Decedent, Petitioners' Complaint lacks a *single factual allegation* in support of this assertion. Petitioners simply conclude the City had inadequate customs regarding enforcement of state DWI laws. [R 126-127]. Furthermore, even Petitioners' briefing reveals the City fired Officer Ontiveros after the Decedent's death, finding the officer *violated* City policy. [Petitioners' Brief at 5-6, 14].

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals did not err in affirming the District Court's dismissal of Petitioners' claims pursuant to FED. R. CIV. P. 12(b)(6). The record establishes that the Decedent was not denied due process of law. Petitioners failed to allege facts showing any

[5] Petitioners' Complaint also includes the conclusory argument that Officer Ontiveros discouraged others from assisting the Decedent but this assertion is not supported by any factual allegations.

constitutionally protected special relationship between the City or former Officer Ontiveros and the Decedent. Likewise, Petitioners failed to allege facts showing a viable claim under the so-called state created danger theory of recovery, if any such claim can exist.

Furthermore, even if Petitioners had alleged facts supporting a claim against former Officer Ontiveros, Petitioners' allegations do not support a claim against the City. Petitioners' Complaint reveals that the alleged deprivation of which the Petitioners complain was an isolated occurrence that was not the result of City policy. Petitioners also failed to allege facts showing the fault of any City official, aside from Officer Ontiveros, and certainly no policymaker who could support a claim against the City. Petitioners also failed to allege facts showing the City was deliberately indifferent to any known risk allegedly caused by its customs. Lastly, Petitioners failed to allege facts showing any City policy or custom was a moving force which caused the Decedent's alleged constitutional injury.

REASONS FOR DENYING THE WRIT

Although the Petitioners cite 28 U.S.C. § 1254(1) as a jurisdictional basis for this Court's review, their challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which identifies the character of reasons considered in the grant or denial of a petition for writ of certiorari. Rule 10 provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

SUP. CT. R. 10.

Neither criterion is met here. In reality, this case presents nothing more than a circuit court's correct application of well established legal principles to specific, yet infirm, factual allegations in a single case. For the reasons that follow, this Court's jurisdiction is not invoked under any prong of Rule 10. Therefore, the petition should be denied.

A. No Constitutionally Protected "Special Relationship" Existed

The record in this case shows that no constitutionally protected special relationship existed between the Decedent and the City or Officer Ontiveros. Historically, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right of bodily integrity." *Albright v.*

Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). "As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992). As such, "the Supreme Court has cautioned federal courts to use 'judicial self-restraint' and 'exercise the utmost care' when asked [as Petitioners do here] to find new rights secured by the Due Process Clause." See *Saenz v. Heldenfels Brothers Inc.*, 183 F.3d 389, 392 (5th Cir. 1999).

It is fundamental that due process protects only against an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" and "government power arbitrarily and oppressively exercised." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716 (1998). The Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 670 (1986)). "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers [of the Constitution] were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *DeShaney*, 489 U.S. at 196, 109 S. Ct. at 1003.

"[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716 (quoting *Collins*, 503 U.S. at 129, 112 S. Ct. at 1071). Therefore, to state a claim of an alleged violation of Due Process, a plaintiff must show a

defendant's action shocks the conscience and was so brutal and offensive as to fail to comport with traditional ideas of fair play and decency. See *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209-210 (1952); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999). Consistent with this approach "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Lewis*, 523 U.S. at 853, 118 S. Ct. at 1720 (quoting *Daniels v. Williams*, 474 U.S. at 332, 106 S. Ct. at 665). "Consistent with these principles, [this Court's decisions] have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney,* 489 U.S. at 195, 109 S. Ct. 1603.

This Court has unmistakably held that the Due Process Clause does not generally require the government to protect the life, liberty or property of an individual against harm caused by private violence. *DeShaney*, 489 U.S. at 195, 109 S. Ct. at 1003. The Due Process Clause, instead, is "a limitation on the State's power to act, not [] a guarantee of certain minimal levels of safety and security." *Id.* While the government cannot lawfully exercise its authority to deprive an individual of due process of law, the government has no constitutionally created duty to ensure any specific individual's interests are not harmed by other means. *Id.* Therefore, "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that

could have been averted had it chosen to provide them." *DeShaney*, 489 U.S. at 196-197, 109 S. Ct. at 1003-1004.

This Court has discussed the very few types of "limited circumstances" in which "the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. This duty of care is limited to only those circumstances in which the government "takes a person into its custody and holds him there against his will." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005; see also *Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004); *Randolph v. Cervantes*, 130 F.3d 727, 730-731 (5th Cir. 1997). In such circumstances, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006.

Therefore, this Court, in *DeShaney*, expressly rejected the notion Petitioners assert here; that a constitutionally protected "special relationship" can exist in a non-custodial situation which requires the government to protect a particular individual.[6] *Id.* The argument urged by the Petitioners here is the same argument DeShaney raised unsuccessfully in this Court nearly twenty years ago. *DeShaney*, 489 U.S. at 197, 109 S. Ct. at 1004. DeShaney argued that, even if the Due Process Clause did not impose a duty to "provide the general public with

[6] Curiously, while the Petitioners claim a "*DeShaney* special relationship duty" and a "*DeShaney* state-created danger duty" supports their claims, Petitioners fail to discuss the facts of the *DeShaney* case, the analysis applied or its holding which specifically rejected both of these claimed duties.

adequate protective services, such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals." *Id.* DeShaney further argued in support of his contention:

> that such a "special relationship" existed [t]here because the State knew [he] faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Having actually undertaken to protect [DeShaney] from this danger – which [p]etitioners concede[d] the State had no role in creating – the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience," as to constitute a substantive due process violation.

DeShaney, 489 U.S. at 197, 109 S. Ct. at 1004.[7]

Assuming Petitioners' pleading allegations are true, Officer Ontiveros knew the Decedent was obviously intoxicated, passersby did not intervene further because of Officer Ontiveros' presence and Officer Ontiveros permitted the Decedent to drive away. Giving credence to these allegations, however, Officer Ontiveros did nothing more

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[7] In note 4 of the *DeShaney* opinion, this Court discussed that the "genesis" of such an argument arose when several Courts of Appeals misinterpreted dicta in this court's opinion in *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553 (1980) to support such a notion. Even though this Court, in *DeShaney*, squarely confronted the question presented there and here – "whether the Due Process Clause imposed upon the State an affirmative duty to protect" – this has not prevented some plaintiffs from continuing to misinterpret this Court's dicta to support such a notion as evidenced by the many cases now emanating on alleged "special relationship" or "state created danger" theories.

than release the Decedent from the officer's investigatory presence[8] in an alleged intoxicated state. This simply does not support a claim under the Due Process Clause. See *id.*

In light of the Petitioners' pleading allegations, the Decedent could not even arguably be considered to have been in the custody necessary to create a constitutional duty. Compare, *Losinski v. County of Trempealeau*, 946 F.2d 544, 550 (7th Cir. 1992) (custody implies restraint which is simply not present here). "The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf." *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005). "The mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized." *Carver v. City of Cincinnati*, 474 F.3d 283, 286 (6th Cir. 2007). Even where an officer has probable cause to affect an arrest but chooses not to restrain the individual, there is no *custody* for purposes of a due process claim. *Id.*

The Petitioners' allegations plainly reveal their real criticism of Officer Ontiveros' conduct is that, although he allegedly had probable cause to arrest the Decedent for driving while intoxicated, Ontiveros failed to make the arrest. Instead, Officer Ontiveros only briefly questioned the Decedent during the accident investigation and then the Decedent drove away.

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[8] The Petitioners argument that the brief interaction between the Decedent and Officer Ontiveros during the course of the brief period of the accident investigation constituted a seizure for purposes of creating a special relationship cannot stand in light of the facts in *DeShaney*. In *DeShaney*, the State had actually taken custody of DeShaney but subsequently released him back to his father and this was not deemed sufficient "custody" to invoke 14th Amendment protections upon his return. *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006.

> As the Supreme Court has clearly pronounced, however, "the benefit that a third party may receive from having someone [] arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural, nor substantive, manifestations. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768, 125 S. Ct. 2796, 2810 (2005). This result reflects [this Court's] continuing reluctance to treat the Fourteenth Amendment as a font of tort law . . . "

Id. at 2810 (internal quotations omitted).

In *Castle Rock,* the plaintiff argued that a police officer's failure to arrest a criminal suspect under a state *mandatory arrest* statute violated Due Process, but this Court held directly to the contrary. In delivering the opinion of the Court, Justice Scalia discussed the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 2806. It is simply "common sense that all police officers must use some discretion in deciding when and where to enforce [the law]." *Chicago v. Morales*, 527 U.S. 41, 62, 119 S. Ct. 1849 n. 32 (1999). "Discretion is essential to the criminal justice process." *McCleskey v. Kemp*, 481 U.S. 279, 297, 107 S. Ct. 1756, 1770 (1987); see also *Hudson v. Hudson*, 475 F.3d 741, 744 (6th Cir. 2007); *Beltran*, 367 F.3d at 306.

The Petitioners do not even allege that a *mandatory* arrest statute was applicable to the facts of this case. To the contrary, the applicable Texas arrest statute provides only that "a peace officer *may* arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CRIM. PRO. § 14.01(b) (emphasis added). As such, Petitioners' allegations do not even approach the less than constitutional dimensions observed in *Castle Rock*. Therefore, the foundation of Petitioners'

legal position is invalid and unsustainable under controlling jurisprudence because Officer Ontiveros was not required under the Constitution to detain the Decedent, even if he was drunk, and because, as the undisputed record shows, the Decedent was not, in fact, detained. See *Gonzales*, 125 S. Ct. at 2806.

As in *DeShaney*, "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203, 109 S. Ct. at 1007. Thus, the Petitioners' allegations, as well as their briefing, plainly show that Officer Ontiveros did not subject the Decedent to incarceration, institutionalization, or any other similar restraint of personal liberty this Court has recognized to support a claim under the Due Process Clause. See *id.*; see also *Jackson v. Schultz*, 429 F.3d 586, 590-591 (5th Cir. 2005). In *DeShaney*, this Court expressly rejected the notion Petitioners assert here; that a constitutionally protected "special relationship" can exist in a non-custodial situation which requires the government to protect a particular individual.[9] *Id.*

Petitioners contend, as did the Petitioners in *DeShaney*, that a law enforcement officer knew an individual faced a danger and that the officer proclaimed by word and deed his intention to protect the individual against that danger. *DeShaney*, 489 U.S. at 197, 109 S. Ct. at 1004. Also, as in *DeShaney*, Petitioners argue that – as in state tort law – a constitutionally mandated duty to protect should

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[9] Curiously, while the Petitioners claim a "*DeShaney* special relationship duty" and a "*DeShaney* state-created danger duty" supports their claims, Petitioners fail to discuss the facts of the *DeShaney* case or its holding which specifically rejected both of these claimed duties.

be imputed to a law enforcement officer who undertakes to protect an individual from harm. *Id.*; see also *Beltran*, 367 F.3d at 307. This Court must, as its precedent instructs, again "reject this argument." *Id.* at 198.

In this case, as Justice Rehnquist explained for the Court in *DeShaney*, "[t]he affirmative duty to protect arises not from the State's knowledge of the [Decedent's] predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own benefit." *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006; see also *Rivera v. Houston Independent School District*, 349 F.3d 244, 248 (5th Cir. 2003).

> In the substantive due process analysis, it is [only] the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to protect his liberty interests against harms inflicted by other means.

Id.; see also *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002); *Randolph*, 130 F.3d at 730; *Walton v. Alexander*, 44 F.3d 1297, 1303-1004 (5th Cir. 1995).

Thus, this is not the type of "limited circumstance" in which the Constitution imposes a duty of care or protection to a particular individual. See *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. Officer Ontiveros **did not take the Decedent into custody and hold him there against his will**, as required to support such a claim. See *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005. A duty to protect did not arise from Officer Ontiveros' mere alleged knowledge of the Decedent's state of intoxication or from Officer Ontiveros' expression of intent to help the Decedent.

Officer Ontiveros simply had no duty to protect the Decedent from the later self-inflicted harm which caused his death because Officer Ontiveros imposed no limitation on the Decedent which impeded his freedom to act on his own behalf, as would be required to support a claim for which relief could be granted. See *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-1006.

Therefore, because this Court expressly rejected the same arguments in *DeShaney*, which Petitioners urge here, their claims of alleged denial of Due Process based upon the contention that Officer Ontiveros failed to protect the Decedent, fails as the Fifth Circuit Court of Appeals correctly held. See *id.* Accordingly, discretionary review is unwarranted because the United States Fifth Circuit Court of Appeals has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. See SUP. CT. R. 10. To the contrary, Petitioners urge this Court to accept the unprecedented, and constitutionally unsupportable, notion that a constitutionally protected special relationship is created under facts which establish otherwise. Officer Ontiveros and the City simply had no duty under the Constitution to protect the Decedent from his own self-destructive act of recklessly driving while intoxicated; therefore, the presiding District Court and the Fifth Court of Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners.

B. No Claim Existed Based Upon "State Created Danger"

The record likewise shows that no claim existed based upon an alleged state created danger theory. Prominently, this Court, like the Fifth Circuit Court of Appeals, has

never recognized a substantive due process claim based upon what is now known as state created danger theory. Compare *Sanford v. Stiles*, 456 F.3d 298, 304 (3rd Cir. 2006); *Rivera*, 349 F.3d at 249.

Some courts have construed a few words in *DeShaney* as this Court's acknowledgement that a due process claim can be brought based upon danger created by the government. As discussed above, in *DeShaney*, DeShaney claimed a violation of due process as follows:

> Having actually undertaken to protect [DeShaney] from this danger – which [p]etitioners concede **the State had no role in creating** – the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, *so the argument goes*, was an abuse of governmental power that so "shocks the conscience," as to constitute a substantive due process violation.

DeShaney, 489 U.S. at 197, 109 S. Ct. at 1004 (emphasis added).

In response to these contentions urged by DeShaney, this Court explained:

> While the State may have been aware of the dangers that [DeShaney] faced in the free world, **it played no part in their creation**, nor did it do anything to render him any more vulnerable to them.

DeShaney, 489 U.S. at 201, 109 S. Ct. at 1006 (emphasis added).

While this language, obviously authored, in response to DeShaney's particular contentions, certainly does not show that this Court would have found a due process violation even if the State had played some role in creating the risk of harm to DeShaney. Sadly, however, this statement made

in reference to DeShaney's contentions has spawned the Petitioners' claims in the instant suit, claiming that this Court's use of the words "State, creation and danger" provide a basis for a substantive due process claim that would not otherwise exist under the Constitution nor would be cognizable under this Court's precedents.[10]

Notably, while the Petitioners have gleaned the words "State, creation and danger" from *DeShaney*, they have wholly ignored the legal analysis and facts in the case, both of which cast great doubt on the viability of the state created danger *theory*. On the *DeShaney* record, this Court discussed that Winnebago County Department of Social Services was aware of a potential risk of harm to DeShaney and had even taken temporary custody of him from his father to protect him from this threat of harm before returning him to a potentially unsafe environment. Because, however, DeShaney was not in State custody when he was injured and because he was injured by a danger that existed before State intervention; Winnebago County Department of Social Services **played no role in creating the danger** that ultimately caused DeShaney harm. *Id.* This Court's conclusion on the *DeShaney* record, thus, cannot support a claim under a state created danger theory here.

The Petitioners complain because the Fifth Circuit has yet to identify a cognizable state created danger claim in light of this Court's decision in *DeShaney,* although it has had many invitations to recognize the theory based upon various factual circumstances. See *Rios v. City of Del Rio,*

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[10] This Court, of course, is not required to follow its "dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Community College v. Katz*, 546 U.S. 356, 363, 126 S. Ct. 990, 996 (2006).

Tex., 444 F.3d 417, 427 (5th Cir. 2006); *Jackson*, 429 F.3d at 591-592; *Hernandez v. Texas Department of Protective and Regulatory Services*, 380 F.3d 872 (5th Cir. 2004); *Beltran*, 367 F.3d at 299; *Rivera*, 349 F.3d at 244; *Morin v. Moore*, 309 F.3d 316, 321 (5th Cir. 2002); *McClendon*, 305 F.3d at 314; *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *Saenz*, 183 F.3d at 391-392; *Randolph*, 130 F.3d at 731; *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995); *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992). Contrary to the Petitioners' argument, however, the Fifth Circuit's repeated rejection of state created danger claims is well-grounded in clear Supreme Court authority. See *id.*

The Fifth Circuit has discussed the likely requirements necessary to support a state created danger claim, if one can be deemed viable. See *id.* In order to support a claim under a state created danger theory, the Fifth Circuit has assumed a plaintiff must, at a minimum, show a state actor created or increased the danger to a plaintiff and that the state actor acted with deliberate indifference to the risk.[11] *Morin*, 309 F.3d at 321-322. Petitioners' claims fail under both prongs of this test, as discussed fully *infra*.

1. Officer Ontiveros Did Not Create a Dangerous Environment

Petitioners' allegations instead establish that Officer Ontiveros did not *create* a dangerous environment. To the contrary, Petitioners' contention is that Officer Ontiveros did not *prevent the Decedent from acting imprudently, but*

[11] Some Circuits require additional elements to support such a claim. See *Sanford*, 456 F.3d at 304-305; *Jackson*, 429 F.3d at 591.

on his own.[12] "Where a claimant accuses government officials of failing to prevent one private party from injuring another, *DeShaney*, and its progeny seldom permit the claim to proceed." *Koulta v. Merciez*, 477 F.3d 442, 443 (6th Cir. 2007) (internal citations omitted). "[E]qual doses of private-party foolishness, governmental incompetence (assuming as we must, the truth of the allegations) and public anguish" do not necessarily establish a civil rights claim under the 14th Amendment. *Id.*

"[T]he Constitution does not require the government to protect citizens from privately created danger." *Witkowski v. Milwaukee County*, 480 F.3d 511, 513 (7th Cir. 2007). Also, merely offering ineffective aid to an individual who is later injured does not amount to state creation of danger. *Losinski*, 946 F.2d at 550. "It is not a constitutional violation for a state actor to render incompetent [] assistance or fail to rescue those in need." *Jackson*, 429 F.3d at 590. Thus, "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006.

"If the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 n. 7 (10th Cir. 1998). "[T]o be liable, [state actors] must have used their authority to create an opportunity that would not otherwise have existed for the third party's

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[12] A claimant's attempt to re-characterize a mere failure to protect claim as affirmative government action by creative allegations cannot change the true nature of a state created danger claim. *Sanford*, 456 F.3d at 312; *Bright v. Westmoreland*, 443 F.3d 276, 283 n. 6 (3rd Cir. 2006).

crime to occur." *Rivera*, 349 F.3d at 249 (quoting *Johnson*, 38 F.3d at 201). Petitioners' allegations undeniably fail under this test.[13]

Petitioners allege the Decedent drove a vehicle while intoxicated before he was involved in a traffic accident that Officer Ontiveros investigated, as well as *after* he was involved in that accident. Petitioners also admit that family members and other concerned citizens recognized at the scene of the initial accident, both *before* Officer Ontiveros' arrival and *after* the Decedent's departure, that he was in no condition to care for himself but failed to provide him with assistance, or even wise advice. Petitioners also admit that Officer Ontiveros permitted the Decedent to drive away from the initial accident scene after the investigation and that he was not in State custody at the time of the subsequent fatal accident.

In their best light, Petitioners' claim that Officer Ontiveros was aware of dangers the Decedent faced but not that Officer Ontiveros *created* those dangers. Petitioners' allegations also claim that Officer Ontiveros had no intention of harming the Decedent or that Officer Ontiveros did anything to render the Decedent any more vulnerable to danger than he was before encountering Officer Ontiveros. These allegations cannot support a claim under the state created danger theory.[14] See *Piotrowski*, 237 F.3d at 584.

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[13] Petitioners claims also fail because they seek to apply the state created danger theory in a circumstance in which the Decedent succumbed to his *own misconduct*, not that of any *third party*, as presumably would be required to support a claim. See *Rivera*, 349 F.3d at 249.

[14] As discussed further below, this record would not support a state created danger, even in jurisdictions outside the Fifth Circuit.

Not only do the Petitioners' allegations disprove that Officer Ontiveros *used his authority*, they also show that he did not use his authority to *create an opportunity* that would not otherwise have existed for the Decedent to be injured. The relevant "[q]uestion is not whether the victim was safer *during* the state action, but whether [he] was safer before the state action than [he] was *after* it." *Jones v. Reynolds*, 438 F.3d 685, 692 (6th Cir. 2006).

A police officer's decision to allow, or even encourage reckless driving, cannot support a substantive due process claim when the officer simply leaves an individual in no worse position than he was already in because the officer's action does not *increase* the risk of harm. *Id.* Again, "*DeShaney* and its progeny make it clear that the police have no affirmative obligation to protect citizens from drunk drivers. Taken to an extreme, police officers could watch drunk drivers stumble to their cars and drive off, weaving across the road, without incurring section 1983 liability." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993). When officers' actions do not create or increase the risk that an innocent victim will be killed by drunken driving, a substantive due process claim simply fails, as a matter of law. *Koulta*, 477 F.3d at 443.

A law enforcement officer's failure to remove a drunken driver from the roads simply does not state a claim for violation of substantive due process. *Saenz,* 183 F.3d at 391-392. In *Saenz*, two law enforcement officers came upon Jose Zuniga, who both officers suspected of driving while intoxicated. The senior officer prevented the junior officer from investigating whether Zuniga was intoxicated. A short time later, Zuniga was involved in a traffic accident in which he and others were injured. *Saenz,* 183 F.3d at 389. Denying a claim of substantive due

process, the *Saenz* Court held that the senior law enforcement officer was "neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the [plaintiffs] from receiving aid." *Id.*

As in *Saenz*, the Petitioners' Decedent was not denied due process because, as the Fifth Circuit plainly held, Officer Ontiveros was likewise neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the Decedent from receiving aid. The Petitioners, therefore, face a legally "insurmountable hurdle" because the Decedent was no worse off driving while intoxicated after his encounter with Officer Ontiveros than he was driving while intoxicated before his contact with the officer. See *Reed*, 986 F.2d at 1125-1126. Stated simply, failure to prevent the Decedent from *continuing to* drive while intoxicated cannot state a claim of state created danger, even if such a claim is otherwise legally cognizable. See *Reed*, 986 F.2d at 1127. "At worse, [Officer Ontiveros] left [the Decedent] in the same position as [he] would have been in had [Officer Ontiveros] not intervened at all. It follows that [Officer Ontiveros] did not increase the risk of harm to [the Decedent], even if he [permitted him] to drive while under the influence of alcohol." See *Wyatt v. Krzysiak*, 82 F.Supp. 2d 250, 259 (D. Del. 1999).

Petitioners' claims fail also because there is no factual allegation that Officer Ontiveros prevented the Decedent from acting on his own behalf or obtaining help from others. When an injured person – like the Decedent here – remains free to voluntarily help himself, or be helped by others, he cannot be said to be cut off from aid. *Jackson*, 429 F.3d at 591-592. There are no factual allegations that Officer Ontiveros involuntarily subjected the Decedent to any known danger. *Losinski*, 946 F.2d at 550-551. Likewise,

there are no allegations any attempt to provide private aid was made to the Decedent. See *Carver*, 474 F.3d at 287. Accordingly, Petitioners' "failure to protect" or "state created danger" claim fails, even if such a claim may theoretically exist consistent with the Court's precedent, because Officer Ontiveros did not subject the Decedent to any dangerous environment created by Officer Ontiveros. See *Saenz*, 183 F.3d at 392.

2. Officer Ontiveros Did Not Act with Deliberate Indifference

Petitioners' allegations also establish that Officer Ontiveros did not act with deliberate indifference. The Fifth Circuit has discussed that, assuming *arguendo* the state created danger theory could be cognizable at all, a plaintiff must show not only that a state actor created a dangerous environment, but also that a state actor acted with deliberate indifference. See *Piotrowski*, 51 F.3d at 515. "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391 (1997). Deliberate indifference, thus, is a high burden for a plaintiff to overcome. *Doe v. Dallas Independent School District*, 153 F.3d 211, 218 (5th Cir. 1998). "There is a significant distinction between a tort and a *constitutional* wrong." *Benavides v. Herrera*, 883 F.2d 385, 388 (5th Cir. 1989). Allegations of mere negligence fail to establish culpability under a constitutional claim. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663 (1995).

"To act with deliberate indifference, a state actor must consciously disregard a known and excessive risk to the

victim's health and safety." *Hernandez*, 380 F.3d at 880. Stated differently, to establish deliberate indifference, in a state created danger context, a police officer must have actual knowledge of and disregard an excessive risk to a plaintiff's health or safety. *McClendon*, 305 F.3d at 326. "A state actor's failure to alleviate 'a significant risk that he should have perceived but did not,' . . . does not rise to the level of deliberate indifference." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994)). "[A]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . " *Hernandez*, 380 F.3d at 883.

Petitioners' allegations here reveal nothing more than simple negligence, at most. Petitioners allege they trusted Officer Ontiveros' alleged representation he would take care of the situation and left the Decedent's well-being in Officer Ontiveros' hands. In essence, Petitioners' allegations are that Officer Ontiveros "stood by and did nothing when suspicious circumstances dictated a more active role for [him]," but allegations of this type simply do not implicate constitutionally protected interests. See *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1007; *Saenz*, 183 F.3d at 392; *Piotrowski*, 237 F.3d at 584 (the City at most left the Decedent in an already dangerous position).

Likewise, Petitioners' allegations pertaining to Officer Ontiveros' exercise of discretion in failing to arrest an allegedly intoxicated driver, or in extending so-called "special favors" to family members of law enforcement officers, even when considered in a light most favorable to Petitioners, sound in negligence and, therefore, fail to support a constitutional claim. See *Beltran*, 367 F.3d at 307-308; *McClendon*, 305 F.3d at 326-327. Moreover, this "special favor" allegation disproves any assertion that

Officer Ontiveros consciously disregarded a known and excessive risk to the Decedent's health and safety. See *Hernandez*, 380 F.3d at 880; *McClendon*, 305 F.3d at 326. These allegations, if proven, would show Officer Ontiveros was attempting to provide a benefit to the Decedent; not to use governmental authority to harm him. See *id.* "[Officer Ontiveros'] decision, while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law." *Saenz*, 183 F.3d at 392.

Moreover, a police officer cannot be said to have been deliberately indifferent to rise to the level of a violation of a plaintiff's rights when the plaintiff himself was also responsible for placing himself in a potentially dangerous condition. See *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 81 (1st Cir. 2005); *Witkowski*, 480 F.3d at 513. Clearly Petitioners' allegations are that the Decedent's death resulted from his own illegal and imprudent acts of driving while intoxicated, not those of any third party. Officer Ontiveros, therefore, cannot be said to have been deliberately indifferent to a known risk for a *third party's crime* to occur. See *Johnson*, 38 F.3d at 201. State created danger simply cannot be premised upon, as here, an alleged failure of government to protect an individual who subsequently suffers a self-inflicted injury. See *id.* Accordingly, Petitioners' claims fail on this ground as well.

Certainly, this Court's decision in *DeShaney* cannot reasonably be interpreted to have expanded substantive due process to include the Petitioners' claim. Therefore, even if a claim based upon state created danger can theoretically occur – consistent with constitutional principles – this record cannot support such a claim. Thus, the presiding District Court and the Fifth Circuit Court of

Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners and correctly dismissed the Petitioners' suit. Accordingly, discretionary review is unwarranted.

C. Petitioners Fail to Allege Facts which State a Claim Against the City

1. There is no Unconstitutional City Policy or Custom

Because there was no unconstitutional conduct, the Petitioners' claims against the City were properly dismissed. If a plaintiff is not the victim of a constitutional deprivation, it is irrelevant whether a city policy or custom would have authorized the conduct of which a plaintiff complains. *City of Los Angeles v. Heller*, 475 U.S. 797, 811, 106 S. Ct. 1571, 1573 (1986); *McKee v. City of Rockwall*, 877 F.2d 409, 414 (5th Cir.), cert. denied, 493 U.S. 1023 (1990).

Moreover, even if Petitioners could support a claim against former Officer Ontiveros individually, there is still no showing the City violated the Constitution. See *Brown*, 520 U.S. at 397, 403, 117 S. Ct. at 1382, 1388. To establish governmental liability on a claim under § 1983, a plaintiff must show a constitutional deprivation and then identify a policy or custom he alleges caused the constitutional violation. *Piotrowski*, 237 F.3d at 578. Petitioners simply do not allege facts of any unconstitutional City policy or custom. Instead, Petitioners merely assert bare conclusions, unsupported by any substantive factual allegations, that the City had a practice of:

> [F]ailing to enforce DWI laws; failing to train officers in enforcement of DWI laws; failing to review and enforce policies & procedures; failing to educate officers regarding a duty to equally

> enforce the laws; failing to review officer conduct; failure to discover incompetent police officers; allowing officers discretion in arresting intoxicated drivers and allowing officers to extend special favors to family members of law enforcement officers.[15]

Conclusory assertions of this sort, masquerading as *allegations*, cannot support a claim for which relief could be granted. See *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). Moreover, there is no allegation any City policymaker can be held culpable under § 1983. Unconstitutional conduct alleged must "be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578; see also *Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001). Here, as the District Court discussed, Petitioners do not even mention any officer other than Officer Ontiveros, thus claims against the City fail.

2. No City Policy or Custom Caused the Decedent's Harm

Petitioners' claims against the City also fail because there is no showing any City policy was a "moving force" which caused the Decedent a constitutional injury. See *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-2038. "[I]t is not enough for a § 1983 plaintiff merely to identify conduct

[15] As discussed *supra*, a police officer is entitled to exercise discretion in arrest situations; therefore, even if these assertions included factual allegations – which they don't – the policies urged are plainly not required under the Constitution. See *Gonzales*, 125 S. Ct. at 2808. None of the alleged "policies" are facially unconstitutional.

properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged." *Brown,* 520 U.S. at 404, 117 S. Ct. at 1388. It is crucial that the requirements of governmental culpability and governmental causation "not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'" *Id.* (quoting *Snyder v. Trepagnier,* 142 F.3d 791 (5th Cir. 1998)). Petitioners fail to allege facts showing any City policy or custom *caused* a violation of the Decedent's federally protected rights, therefore, Petitioners' claims were properly dismissed.

CONCLUSION

The District Court correctly determined, and the Fifth Circuit Court of Appeals correctly affirmed, that Petitioners' allegations failed to meet the pleading requirements of FED. R. CIV. P. 12(b)(6). The Petitioners failed to allege facts showing a constitutionally justifiable special relationship between the Decedent and former Officer Ontiveros or the City. Additionally, the Petitioners failed to allege facts supporting a claim under a state created danger theory. Petitioners' allegations disprove the assertion Officer Ontiveros created a dangerous environment and establish Officer Ontiveros was not deliberately indifferent to any known risk of harm to the Decedent.

Moreover, even if Petitioners could support a claim under against former Officer Ontiveros, Petitioners' allegations do not support a claim against the City. The isolated deprivation the Petitioners allege was not the result of any City policy or custom. Furthermore, there are no allegations showing any City policy or custom was a

moving force which caused the Decedent's alleged constitutional injury.

Discretionary review is, thus, unwarranted in this case because the United States Fifth Circuit Court of Appeals has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. To the contrary, the Petitioners urge this Court to accept the unprecedented notion that a constitutionally protected special relationship is created under facts which establish otherwise. Officer Ontiveros and the City simply had no duty under the Constitution to protect the Decedent from his own self-destructive act of recklessly driving while intoxicated; therefore, the presiding District Court and the Fifth Circuit Court of Appeals correctly applied established legal principles to the specific factual circumstance alleged by Petitioners.

For these reasons, this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(4)

No. 06-1645

IN THE

Supreme Court of the United States

MARIE INEZ CRAVENS, et al,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. The City's Arguments Fall Outside the Correct Standard of Review and Therefore Should Be Rejected.

The City argues the facts in the light most favorable to the City. These self-serving arguments fall outside the correct standard of review, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002), and should be rejected out of hand when evaluating the pleadings under Fed. R. Civ. P. 12 (b)(6).

A.
The pleaded facts are sufficient to support a "state-created danger" theory of liability.

Viewing the facts in the light most favorable to Petitioners, a reasonable mind can only conclude that the cause of action is properly pleaded. In fact, the district court found the pleaded facts were sufficient to support a "state-created danger" theory of liability. The appeals court avoided the issue by making a pure legal ruling: the "state-created danger" theory did not exist in the circuit. Therefore, according to the appeals court, there could be no liability for the City as a matter of law regardless of the pleaded facts.

The legal issue for this Court to decide is whether the "state-created danger" theory should be recognized throughout the land or abolished. The City never addresses this legal issue. Instead, it misses the point. It argues the facts in its favor and encourages the Court to ignore the legal conflict in the circuits. Petitioners urge the Court to resolve the legal conflict one way or the other and not be distracted by the City's subterfuge.

Cravens' due process entitlement to protection arises from the state's creation of the danger; to wit: cutting-off his private source of aid. To the extent the state creates a specific danger for a specifically identified individual within its control "on the scene," Castle Rock, *infra,* at 760, the state has an obligation to ameliorate that danger. In this case, the danger could be eliminated by returning Cravens to his zone of private safety or establishing a state-created zone of safety. For example, the officer could have taken Cravens into custody for purposes of providing medical attention, taken him to jail to keep him from driving, called him a cab, driven him home, confirmed Cravens' cousin would not allow Cravens to drive. There are many options, but one duty: protect Cravens from the danger created by the police. If protection is carried out via arrest, so be it. However, arrest is not the only state-created solution. Entitlement to arrest is a red herring. The issue is entitlement to protection.

The "no entitlement to have another arrested" holding in Town of Castle Rock, Colo. v. Gonzalez, 545 U.S. 748 (2005) is inapposite. There, a woman sought police protection from a private actor not on the scene and whose whereabouts was unknown. She claimed that she had a non-discretionary right to have that elusive private actor arrested. In this case, Cravens argues he had a right to be protected from the danger created by the police. Once the police arrived, the private actors were arguably either intimidated from carrying out their plan of protection or trusted the police to properly perform the duty to render proper aid under the circumstances. Once the police created the danger by cutting-off aid, the police had a duty to properly protect Cravens from that danger. Under these circumstances, even if the officer had discretion regarding arrest, he did not have discretion when it came to protecting Cravens from the danger the officer created.

B.
The pleaded facts are sufficient to support a "special relationship" theory of liability

Petitioners ask the Court to extend the DeShaney "special relationship" duty to the extent of the state's degree of control (via police power) over a specific individual being detained "on the scene." Castle Rock, *infra,* at 760.

Out of deference and limited authority, the district court was not willing to so extend DeShaney.

The appeals court never commented on the issue.

Petitioners ask the Court to ultimately hold that Ontiveros' affirmative act of detaining Cravens for questioning was sufficient to trigger a duty to render aid. Ontiveros had a duty to either return Cravens to his zone of safety or create an alternate zone of safety. This Court may ultimately hold that Cravens had to be formally arrested before any duty to protect would arise. However, DeShaney did not draw that bright line. The requested extension is properly within the province of this Court and the words of Chief Justice Rehnquist. The state has a duty to protect when it "*puts some other similar restraint on an individual's personal liberty by the affirmative exercise of state power such that he cannot act on his own behalf.*" DeShaney at 199-200. The detention here should satisfy the "similar restraint" requirement. Cravens could not act on his own behalf when the state detained him. He was dependent upon the good will of his private actors at first. Then, when detained, he was dependent upon the good will of the state actor Ontiveros. Since the detention displaced the private source of aid, Ontiveros had an obligation to properly address Cravens' needs at that point.

Only this Court can and should properly extend DeShaney to these facts.

C.
The pleaded facts are sufficient to support direct liability against the City.

Petitioners have adequately pleaded facts under which the City could be held directly liable for the conduct of Ontiveros. We all are bound to view those facts in the light most favorable to Petitioners. The City chooses to ignore this standard. Petitioners respectfully remind this Court that even in a worst case scenario, arguably the City ratified the conduct of Ontiveros through no disciplinary action for two months and only acted once the City received notice of claim. The City fired Ontiveros on the very day the City received notice of claim. The district court and the appeals court ignored the ratification theory. The City ignores it in its Brief in Opposition.

CONCLUSION

This case is worthy of the Court's consideration. Petitioners pray the Court grant the Petition, ultimately resolve the conflict in the circuits over DeShaney, reverse the courts below and remand the case for trial consistent with this Court's opinion. "Thus Always to Tyrants."[1]

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[1] The Great Seal of Virginia features the Roman goddess Virtus standing over a defeated opponent. She represents the virtues of heroism, righteousness, freedom, and valor. She stands in a classical victor's pose over a fallen tyrannical foe, whose crown lies on the ground. The state's motto "Sic Semper Tyrannis" ("Thus Always to Tyrants") appears at the lower edge. The seal was approved at Virginia's 1776 Constitutional Convention.

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